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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 455

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, AND ABRAHAM S. PHILLIPS, EXECUTORS OF THE ESTATE OF I. L. PHILLIPS, DECEASED, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,377)

(35,377)

SUPREME COURT OF THE UNITED STATES

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vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fols. a & 1]

BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 19286

Estate of I. L. Phillips, Annie G. Phillips, Arthur L. Phillips, Seymour Phillips, and Abraham S. Phillips, as Executors,

vs.

Commissiondr of Internal Revenue

For Taxpayer: Herman Goldman, Esq.
For Commissioner: J. E. Mather, Esq., Mr. Littleton (Member).

Docket Entries

1926.
Aug. 14. Petition received and filed.
" 17. Copy of petition served on Solicitor.
" 14. Notification of receipt mailed taxpayer.
Oct. 4. Motion for extension to 12-3-26 to file answer—filed by Gen. Counsel.
" 12. Granted—Both sides notified.
Dec. 2. Answer filed by G. C.
" 29. Copy of answer served on taxpayer—Gen. Cal.
1927.
June 2. Motion to file amended petition filed by taxpayer, amendment tendered.
" 4. Granted—Both sides notified.
" 4. Copy of amended petition served on G. C.

[fol. 2]

Aug. 2. Answer to amended petition filed by G. C. Copy served 8-3-27.
1928.
Aug. 22. Hearing date set Oct. 2, 1928.
Sept. 21. Motion for a 30 day continuance filed by taxpayer.
" 26. Granted to Nov. 5, 1928.
Oct. 17. Motion to amend answer filed by G. C. Amendment tendered. Granted 10-19-28.
" 26. Stipulation of facts filed.

1928

Nov. 5. Hearing had before Mr. Littleton—taxpayer's brief due 30 days to be served—30 days for Commissioner to be served and 15 days for reply.

" 7. Transcript of hearing Nov. 5—filed.

" 27. Motion for extension to Dec. 31, 1928, to file brief filed by taxpayer. Granted.

Dec. 20. Brief filed by taxpayer. Copy served Dec. 21st.

1929.

Jan. 25. Brief filed by G. C.

Feb. 18. Motion for extension to March 24, 1929, to file reply brief, filed by taxpayer.

" 19. Order extending time to 3-5-29 to file reply brief entered.

Apr. 2. Findings of Fact and Opinion rendered Mr. Littleton—Judgment will be entered for the Commissioner.

" 3. Decision entered.

[fol. 3]

Oct. 1. Supersedeas bond in the amount of $18,612.72 approved and ordered filed.

" 1. Petition for review by U. S. Circuit Court of Appeals—2nd Circuit, with assignments of error filed by taxpayer.

" 2. Proof of service filed.

Nov. 25. Motion for extension to 12-31-29 to prepare and transmit record filed by taxpayer.

" 25. Præcipe filed—proof of service thereon.

" 26. Order enlarging time to Dec. 31, 1929, for preparation of evidence and transmission of record papers, entered.

Dec. 31. Order enlarging time to Jan. 15, 1930, for filing record entered.

Now, December 14, 1929, the foregoing docket entries certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 4] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED PETITION

(b) The Executors of the Estate of the above named taxpayer, I. L. Phillips, Deceased, of 1225 Broadway, New York, N. Y., hereby appeal from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:E:RR BSP-60D) dated June 16th, 1926, and as the basis of its appeal sets forth the following:

(c) The deficiency letter (a copy of which is attached) was mailed to the taxpayer on the 16th day of June, 1926, and showed a deficiency in the amount of $9,306.36 on account of Federal Individual Income Taxes for the years 1918 and 1919, and the amount of taxes in controversy is less than $10,000.00, to-wit: the sum of $9,306.36.

[fol. 5] (d) The determination of tax contained in said deficiency letter is based upon the following errors:

(1) The Commissioner of Internal Revenue erred in disregarding the period of limitations upon assessment and collection of taxes, in proposing to assess against the taxpayer, I. L. Phillips, so-called additional corporation income and profits taxes of the Coombe Garment Company of Philadelphia of $9,124.68 for the year 1919 and $277.75 for the year 1918.

(2) That the Commissioner erred in computing the net income for the year 1919 of the Coombe Garment Company by not allowing as a deduction from net income, loss sustained on good will in the amount of $50,000.00.

(3) That the Commissioner of Internal Revenue has erred in determining that there are deficiencies for the years 1918 and 1919 against the petitioner, due and payable or collectible from him or his Estate or from the Executors of said Estate.

(e) The facts upon which the petitioner relies upon as the basis of this appeal are as follows:

1. The Treasury Department audited the Corporation Income and Profits Tax Returns of the Coombe Garment

Company, a corporation formerly located at 1046 S. 58th [fol. 6] Street, Philadelphia, Pa., and the Treasury Department in its letter to the taxpayer dated June 16, 1926, stated as follows:

"As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you, as a transferee of the assets of the Coombe Garment Company, dissolved, 1046 S. 58th Street, Philadelphia, Pa., the sum of $9,306.36, representing unpaid income and profits tax assessed against that company for the years 1918 and 1919, as detailed in the attached statement."

The right of the Commissioner to assess and collect additional taxes against the taxpayer, I. L. Phillips, expired.

The Commissioner of Internal Revenue is outlawed from making said assessment or collection of additional assessment on account of Corporation Income and Profits Taxes for the years 1918 and 1919 against the taxpayer, I. L. Phillips.

That no suit or proceeding for the collection of additional taxes of the Coombe Garment Company against I. L. Phillips was begun within five years after the date when the returns were due or made.

That no suit or proceeding for the collection of additional taxes was begun against the Coombe Garment Company within five years after the date when the returns were due or made.

[fol. 7] 2. That on March 1, 1913, the Coombe Garment Company had good will valued at least $50,000.00.

During the year 1919, the corporation disposed of its good will.

That there has not been allowed as a deduction from the net income of the Coombe Garment Company for the year 1919 loss sustained on good will in the amount of $50,000.00.

3. The Commissioner has proposed to assess the entire additional tax of Coombe Garment Company for the years 1918 and 1919 against I. L. Phillips.

I. L. Phillips was not the sole stockholder of the Coombe Garment Company at the time when the Coombe Garment Company liquidated.

The Coombe Garment Company at the time of liquidation had an issued capital stock of $50,000.00 and the following

is a list of the stockholders of the dissolved company showing their percentage of ownership therein:

B. C. Guildin	20%
I. L. Phillips	25
F. J. Noonan	5¼
C. S. Parmley	5¼
C. H. Parnell	2
Effie Scott	8¾
Max Phillips	13⅛
[fol. 8] I. A. Coombe	2⅝
H. F. Bushar	5
T. H. Coombe	5
R. R. Updegrave	6
Roy Updegrave	2

The Commissioner of Internal Revenue has erred in determining that there are deficiencies for the years 1918 and 1919 against the petitioner.

There are no unpaid tax liabilities which are due and payable by the Coombe Garment Company for the years 1918 and 1919.

The Commissioner of Internal Revenue is outlawed in collecting any additional taxes from the Coombe Garment Company for the years 1918 and 1919.

There are no unpaid tax liabilities which are due and payable by the petitioner for the years 1918 and 1919 which are due and payable.

The Commissioner of Internal Revenue is outlawed from collecting any taxes from the petitioner as "transferee" for the years 1918 and 1919.

Section 280 of the Revenue Act of 1926 is unconstitutional because of the following:

This section tries by retroactive provisions to make collectible taxes which were already outlawed for collection prior to the enactment of the Revenue Act of 1926. Deficiencies should be determined and assessed in accordance [fol. 9] with some reasonable rule of apportionment, and the exercise of a taxing power consists of two distinct processes, one being the imposition and assessment and the other collection. Section 280 merges the two steps in the process of taxation, loses the identity of collection in the tax and results in a direct tax against the transferee which

is levied without apportionment and not based on income and violates the Constitution of the United States. Section 280 deprives the transferee of his property without the due process of law.

The right to pursue assets in the hands of a third party for income tax of a transferor is lodged solely in a court of competent jurisdiction and not in the Commissioner of Internal Revenue.

Section 280 deprives the transferee, when assessed, of his legal and equitable rights and privileges in that it fails to permit the transferee to bring in any new parties or require the original taxpayer or debtor or other distributees from the original taxpayer to bear with him the burden of the defense, and to contribute their part to the common action.

Section 280 does not require the Commissioner of Internal Revenue to take all steps necessary to secure a possible collection of the tax from the transferor before first taking action against the transferee for the tax.

[fol. 10] Section 280 makes attempts to clothe the Commissioner of Internal Revenue, who is only an administrative officer with judicial powers.

Section 280 does not give the transferee the power to ascertain whether or not the taxes sought to be collected are even due from the transferor.

Section 280 places the burden of proof upon the transferee in proving the tax, if any, be due of the "taxpayer".

Section 280 of the Revenue Act of 1926 deprives a petitioner of his right of a trial by jury.

It is public knowledge that the Commissioner of Internal Revenue by determining a deficiency against the transferee does so on the theory that the assets of a corporation are a trust fund for the benefit of creditors. The right to determine a deficiency against the transferee and to collect same is not lodged in the hands of the Commissioner of Internal Revenue but is lodged solely in a court of competent jurisdiction.

An appeal allowed by the statute under the law to the United States Board of Tax Appeals does not afford the taxpayer "due process" for the reason among many others that an appeal to the United States Board of Tax Appeals requires the payment of a filing fee before contesting the tax and also places the burden of proof upon the transferee

[fol. 11] in overthrowing the findings of the Commissioner and compels the transferee to initiate the proceedings at his own expense; grants no right to the transferee to make anyone but the Commissioner of Internal Revenue a party to the proceedings before the United States Board of Tax Appeals.

Section 280 is indefinite and uncertain for the reason that those who deal in the exchange of or other method of dealing in property cannot determine their obligations under the revenue law simultaneously with the transaction. The revenue act of 1926 of which Section 280 is a part undertakes in no way to determine the measure of the liability of the transferee of property of a taxpayer for the tax primarily due by the taxpayer nor does it lay down any rule by which it may be determined. The law attempts to authorize the Commissioner of Internal Revenue to assess the liability at law or in equity of the transferee of property of a taxpayer. However, before the assessment can be made, the liability must be determined. The law is silent as to who shall fix the liability at law or in equity.

An appeal to the United States Board of Tax Appeals does not confer "due process" for the reason that the Board is not a court because the members are not appointed for life.

The right to appeal from the Board of Tax Appeals to the [fol. 12] United States Circuit Court of Appeals is for review of errors of law and not of fact. No new evidence can be introduced before the United States Board of Tax Appeals. Therefore, there is no judicial determination of the liability of the transferee by the United States Board of Tax Appeals.

The obligation, if any, of a transferee is a debt founded upon contract, expressed or implied, rather than a tax and a debt cannot be assessed and collected by a ministerial officer through the application and determination by him of legal and equitable principles.

The "transferee" reserves all rights to urge any and all other grounds and reasons in connection with this petition.

(f) Wherefore, the taxpayer prays that this Board hear the proceding and grant it relief as follows:

1. That the Commissioner of Internal Revenue be not permitted to assess the proposed additional taxes or issue any

warant or lien or bring any suit or proceeding for the collection of said tax against the taxpayer.

U. S. of America vs. Godfrey L. Cabot, Supreme Court of the District of Columbia, decided June 15, 1926.

New York & Albany Lighterage Company vs. Bowers, So. District of New York, decided February 13, 1925.

[fol. 13] 2. That there be allowed in the computation of the net income of the Coombe Garment Co. for the year 1919 a deduction of $50,000 representing March 1, 1913, valuation of good will.

3. That the deficiencies determined by the Commissioner of Internal Revenue for the years 1918 and 1919 be disallowed, cancelled and eliminated because Section 280 is unconstitutional in accordance with the decision rendered in the case of Owensboro Ditcher & Grader Company v. Lucas, U. S. District Court, Western District of Kentucky, decided April 16, 1927.

Arthur Rothstein, Counsel for the Petitioner, 120 Broadway, New York, N. Y.

—Duly sworn to by Seymour Phillips. Jurat omitted in printing.

[fol. 14] Treasury Department, Washington, Office of Commissioner of Internal Revenue

IT:E:RR. BSP-60D

Mr. I. L. Phillips, 1225 Broadway, New York, N. Y.:

As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you, as a transferee of the assets of the Coombe Garment Company, dissolved, 1046 S. 58th Street, Philadelphia, Pa., the sum of $9,306.36, representing unpaid income and profits tax assessed against that Company for the years 1918 and 1919, as detailed in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the

[fol. 15] redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7; in the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by ——.

——, Assistant to the Commissioner.

Enclosures: Statement, Waiver—Form A.

[fol. 16] IT:CA-2228-6.

April 8, 1924.

Coombe Garment Company, Minersville, Penna.

Sirs: Reference is made to your brief dated February 26, 1924, in which protest is made against the proposed additional assessment in the amount of $562.23, as outlined in office letter dated February 4, 1924, and to your application for assessment under Sections 327 and 328 of the Revenue Act of 1918.

Before consideration can be given your application there must be a final determination of your net income and invested capital for the year 1918. Therefore, it will be necessary for you to advise this office within twenty days from the date of this letter of your acquiescence in the following determination of your net income and invested capital, or exceptions, if any, which you may take thereto:

1918 additional tax $277.75

Computation of Net Income

Net income as shown by examining officer	$20,530.15
Less additional depreciation allowed	345.25
Corrected net income	$20,184.90
Invested capital as shown by examining officer	29,111.27
[fol. 17] Excess profits credit	5,325.90
War profits credit	5,911.13
Excess profits tax computed under Section 302	$5,247.92
Tax at 12% rate	1,552.44
Total tax assessable	$6,800.36
Tax previously assessed	6,522.61
Additional tax due	$277.75

Inasmuch as your corporation has been liquidated, the deficiency in tax has been assessed without giving the usual time allowed under Section 274(a) of the Revenue Act of 1924.

fk-7.

In re Coombe Garment Company, 1046 South 58th Street, Philadelphia, Pennsylvania

1919

Deficiency in tax		$9,124.68
Net income as reported by Revenue Agent		$28,925.80
Add increase in profits on sale of assets due to allowing additional depreciation in 1918		345.25
Adjusted net income		29,271.05

The profits tax has been computed under Section 302 as follows:

[fol. 18] Net income	$20,000.00	
Less Exemption	3,000.00	
Taxable at 20%	$17,000.00	$3,400.00

Balance of net income taxable at 40%	9,271.05	
		3,708.42
Total profits tax		$7,108.42
Net income	$29,271.00	
Less:		
Profits tax $7,108.42		
Exemption 2,000.00		
	9,108.42	
Balance subject to tax at 10%	$20,162.58	
Amount of tax at 10%		2,016.26
Total tax assessable		$9,124.68
Previously assessed		None
Deficiency in tax		$9,124.68

It is important that reference be made in your reply to IT:CA:-2228-8-App.

Respectfully, J. G. Bright, Deputy Commissioner, by (Signed) F. R. Quin, Head of Division.

Now, December 14, 1929, the foregoing amended petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 19] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED ANSWER—Filed Oct. 17, 1928

Comes now the Commissioner of Internal Revenue, by and through his Attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue and for his Amended Answer to the Amended Petition filed herein admits, denies and alleges:

B. Admits the allegations contained in Paragraph B of the Amended Petition.

C. Admits that the taxes in controversy are the Federal Income and profits taxes of the Coombe Garment Company for the years 1918 and 1919 in the amount of $9,306.36.

D. Denies each and every allegation of error contained in Paragraph D of the Amended Petition.

[fol. 20] E (1). Admits that the Commissioner proposed for assessment against petitioner the unpaid income and profits taxes assessed against the Coombe Garment Company for the years 1918 and 1919, and alleges that the said proposal and notice of deficiency was mailed to petitioner within the time required by law.

E (3). Admits that at the time of the liquidation of the Coombe Garment Company this petitioner was one of the stockholders of said company.

G. Denies each and every other allegation, matter, and thing in said Amended Petition contained.

Respondent further answering, alleges:

H. That during all the times material herein the Coombe Garment Company was a corporation organized and existing under the Laws of the State of Pennsylvania.

I. That on June 17, 1919, said corporation filed its income and profits tax return on Form 1120 for the calendar year 1918 with the Collector of Internal Revenue, First District of Massachusetts, disclosing a tax of $6,522.61.

That on February 9, 1924, said corporation filed a waiver, Form 1435 M, extending the statutory period of limitation for the determination, assessment, and collection of the amount of income and excess profits or war profits taxes due under any return made by or on behalf of said Coombe Garment Company for the year 1918 for a period of one year.

[fol. 21] That on or about March 6, 1920, said corporation filed its income and profits tax return on Form 1120 for the calendar year 1919 with said Collector.

J. That in February, 1925, and within the statutory period extended by said waiver, the Commissioner of Internal Revenue assessed against said corporation additional income and excess profits taxes for the year 1918 in the sum of $277.75, appearing on the February, 1925, Commissioner's List, Page 1, Line 2, $96.07 of said assess-

ment having been paid under date of July 3, 1925, leaving a balance of $181.60 oustanding; that in December, 1924, and within the time prescribed by law, the Commissioner of Internal Revenue assessed against said corporation additional income and excess profits taxes for the year 1919 in the sum of $9,124.68, appearing on the December, 1924, List, Special #8, Page 0, Line 0.

That there is assessed, outstanding, and unpaid income and excess profits taxes of said corporation for the years 1918 and 1919 in the amount of $9,306.36; that said corporation was duly notified of the aforesaid taxes and payment thereof duly demanded.

K. That on or about September 27, 1919, said corporation discontinued its business and was thereafter dissolved by voluntary act of its stockholders.

That said corporation, after paying certain corporate indebtedness, distributed all of its assets to its then stock-[fol. 22] holders; that this petitioner as one of such stockholders received in such distribution so made by said corporation assets and property largely in excess of the taxes and interest involved in this appeal.

That such distribution so made to such stockholders, and particularly this petitioner, was voluntary and without consideration and that, by reason thereof respondent has been and still is unable to collect said taxes from said Coombe Garment Company.

Wherefore respondent prays that the Com-sioner's determination that petitioner is liable herein as a transferee of the assets of the Coombe Garment Company within the purview of Section 280 and for the amount of taxes with interest involved in this appeal, be in all things approved.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: J. H. Mather, Jeff T. Jones, Special Attorneys, Bureau of Internal Revenue.

JTJ/tcl. 10/17/28.

Now, December 14, 1929, the foregoing Amended Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 23] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19286

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

FINDINGS OF FACT AND OPINION—Promulgated April 2, 1929

Under Section 280 of the Revenue Act of 1926 one of eleven transferees of the assets of the corporation upon liquidation who received property of a great value than the deficiency in income and profits tax due by the corporation, is liable for payment of the entire deficiency.

Herman Goldman, Esq., for the Petitioner.
J. E. Mather, Esq., for the Respondent.

The Commissioner determined and assessed deficiencies in income and profits tax against the Coombe Garment Company of $277.75 for 1918 and $9,124.68 for 1919, and on June 16, 1926, mailed a notice to I. L. Phillips, a transferee, [fol. 24] proposing therein to assess against and collect from him the amount of additional unpaid taxes for the years in question assessed against the Coombe Garment Company.

The facts are stipulated.

Findings of Fact

The executors are residents of New York, N. Y. The Coombe Garment Company, Inc., and the Coombe Garment Company are one and the same; a Pennsylvania corporation, which had its principal place of business in Philadelphia, Pa. The corporation filed its corporation income and profits tax return for the calendar year 1918 on June 16, 1919, and its return for the year 1919 on March 6, 1920. At the time of complete liquidation, September 27, 1919, the corporation had issued and outstanding capital stock of

$50,000, represented by 500 shares of a par value of $100 each. The stockholders, the number of shares owned by each and the percentage of capital stock owned by each to the total capital stock outstanding of the Coombe Garment Company, and the amount received by each stockholder as liquidating dividends, were as follows:

Name of stockholder	Percentage of stockholdings	Amount received in liquidation
B. C. Guldin	180/0003/900	$13,711.69
I. L. Phillips	225/0003/900	17,139.61
F. J. Noonan	47/3690/900	3,608.38
C. S. Parmley	47/3690/900	3,608.38
[fol. 25] C. H. Parnell	18/0003/900	1,371.19
Effie E. Scott	78/1600/900	9,953.90
Max Phillips	118/4182/900	9,020.61
L. A. Coombe	23/6823/900	1,804.02
W. H. Coombe	45/0002/900	3,427.94
R. R. Updegrave	81/0002/900	6,170.27
Roy Updegrave	36/0002/900	2,742.36
		$68,558.35

The amount of $68,558.35 shown above as paid in liquidating dividends was the total assets of the Coombe Garment Company and was paid by said corporation to its stockholders between July 25, 1919 and September 27, 1919.

The Commissioner assessed against the corporation an additional tax of $277.75 for 1918 in February, 1925, and an additional tax of $9,124.68 for 1919 in December, 1924.

$96.07 of additional tax assessed against the corporation for 1918 has been paid, leaving $9,306.36 unpaid tax due upon the income of the corporation for the years involved. No suit or proceedings for collection of said additional assessments against the Coombe Garment Company have been begun, made, or instituted.

June 16, 1926, the Commissioner mailed to I. L. Phillips, at 1225 Broadway, New York, N. Y., a notice of his determination of petitioner's liability for the unpaid tax of the corporation as follows:

[fol. 26] As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you, as a

transferee of the assets of the Coombe Garment Company, dissolved, 1046 South 58th Street, Philadelphia, Pennsylvania, the sum of $9,306.36, representing unpaid income and profits tax assessed against that company for the years 1918 and 1919, as detailed in the attached statement.

The Commissioner is proposing by the aforesaid notice to assess and collect from I. L. Phillips the entire additional tax of the Coombe Garment Company and has not sent to any other stockholder, as transferee of the assets of the Coombe Garment Company, a notice on account of the unpaid deficiencies for the years 1918 and 1919 of the Coombe Garment Company.

February 9, 1924, the Coombe Garment Company and the Commissioner consented in writing to the extension of the statutory period of limitation for the determination, assessment and collection of the amount of income and excess-profits or war-profits taxes due under any return made by or on behalf of said Coombe Garment Company for the year 1918, for a period of one year.

I. L. Phillips has not entered into any agreement with the Commissioner with regard to the time within which any amounts on account of the taxes of the corporation for 1918 and 1919 may be assessed and/or collected against him.

There is no suit or proceeding pending against any of the other stockholders of the Coombe Garment Company for [fol. 27] collection of all or any part of the additional taxes of the Coombe Garment Company for the years 1918 and 1919 above referred to.

Opinion

LITTLETON: The executors contend (1) that Section 280 of the Revenue Act of 1926 is unconstitutional, and (2) if the section is constitutional, the estate of I. L. Phillips is liable for only its pro rata portion of the unpaid tax of the corporation.

The first contention is disposed of by the opinion of the Board in Henry Cappellini, et al., 14 B. T. A. 1269, and the second claim advanced is governed by the opinion of the Board in Grand Rapids National Bank, 15 B. T. A. —, promulgated March 29, 1929, in which we held that any one of several transferees of the assets of the corporation is

liable for the unpaid tax of the corporation to the extent of the amount received upon liquidation. Since I. L. Phillips received property of a greater value than the amount of the tax due by the Coombe Garment Company, the taxpayer, the Commissioner's determination is approved.

Judgment will be entered for the respondent.

Now, December 14, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 19286

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, Deceased, Petitioners,

v

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated April 2, 1929, it is

Ordered and decided: That there are deficiencies of $277.75 and $9,124.68 for the years 1918 and 1919, respectively.

(Signed) B. H. Littleton, Member United States Board of Tax Appeals.

Enter.

Entered Apr. 3, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 29] Now, December 14, 1929, the foregoing decision certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REVIEW—Filed Oct. 1, 1929

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Come now Annie G. Phillips, Arthur L. Phillips, Seymour Phillips and Abraham S. Phillips, as Executors of [fol. 30] the Estate of I. L. Phillips, deceased by their attorney, and bring this petition for a review by the United States Circuit Court of Appeals for the Second Circuit of the judgment and order of redetermination of the deficiency tax rendered and entered by the United States Board of Tax Appeals on April 3d, 1929, and for a review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board of Tax Appeals adverse to the petitioners and upon which the said judgment and order were made and promulgated April 3d, 1929, and for their said petition respectfully show:

First. The petitioners reside in the Borough of Manhattan, City and State of New York, and are within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

Second. The controversy herein involved arises out of the determination by the Commissioner of Internal Revenue that the petitioners' decedent, as transferee of a portion of the assets of the Coombe Garment Company, was liable for the payment of deficiencies in the income and profits tax determined and assessed against the said Coombe Garment Company for the years 1918 and 1919.

The facts involved in this controversy are as follows:

(1) The Coombe Garment Company was a corporation duly organized under the laws of the Commonwealth of [fol. 31] Pennsylvania on May 2nd, 1902, and had its principal office and place of business at Philadelphia, Pennsylvania.

(2) The Coombe Garment Company filed its corporation income and profits tax return for the calendar year 1918

on June 16th, 1919, and the corresponding return for the year 1919 on March 6th, 1920.

(3) In September, 1919, the said Coombe Garment Company dissolved; at the date of final liquidation and dissolution the corporation had issued and outstanding capital stock of $50,000 represented by 500 shares of a par value of $100 each. The petitioners' decedent was one of the eleven stockholders of the said Coombe Garment Company and received upon the dissolution of the corporation as his pro rata share of its assets totaling $68,558.35, the sum of $17,139.61.

(4) The Commissioner assessed against the Coombe Garment Company an additional tax of $277.75 for the year 1918 in February, 1925, and an additional tax of $9,124.68 for the year 1919 in December, 1924. There was previously paid the sum of $96.07 of the tax assessed for the year 1918, leaving a total unpaid deficiency tax of $9,306.36 allegedly due by the said Coombe Garment Company for the years involved.

(5) On June 16th, 1926, the Commissioner mailed to the petitioners' decedent at 1225 Broadway, New York City, a notice of his determination of the decedent's liability for [fol. 32] the total unpaid deficiency tax of the Coombe Garment Company.

(6) The Commissioner in sending to the decedent notice of his determination, was seeking to collect the entire additional deficiency tax from the said decedent and is now seeking to collect the said deficiency tax from the petitioners as the executors of the decedent's estate and has not sent to any other former stockholder as transferee of the assets of the Coombe Garment Company a notice on account of the unpaid deficiency tax for the years 1918 and 1919.

(7) The petitioners appealed to the United States Board of Tax Appeals from the said determination of the Commissioner; the Board of Tax Appeals affirmed the determination of the Commissioner and entered judgment accordingly.

(8) The petitioners are petitioning the review of the said decision, judgment and order of redetermination of the

United States Board of Tax Appeals pursuant to the provisions of Section 1001-A of the Revenue Act of 1926, feeling that they have been greatly aggrieved by the said decision of the Board of Tax Appeals.

Third. The petitioners respectfully allege that manifest error has been committed by the United States Board of Tax Appeals in the rendering of the aforesaid judgment and decision, to wit:

[fol. 33] (1) The Board erred as a matter of law in not finding that Sectional 280 of the Revene Act of 1926 is unconstitutional.

(2) The Board erred as a matter of law in deciding that the petitioners were estopped from questioning the constitutionality of Section 280 of the Revenue Act of 1926.

(3) The Board erred as a matter of law in not finding that the Commissioner of Internal Revenue did not have the power to determine the decedent's liability for the deficiency tax of the Coombe Garment Company for the year 1918.

(4) The Board erred as a matter of law in not finding that the Commissioner of Internal Revenue did not have the power to determine the decedent's liability for the deficiency tax of the Coombe Garment Company for the year 1919.

(5) The Board erred as a matter of law in not finding that the petitioners had the right to have their liability as executors of the estate of the decedent, an alleged transferee of the assets of the Coombe Garment Company, determined according to the equitable principles enunciated and laid down by the courts of equity of the United States.

(6) The Board erred in determining that the petitioners were liable for the total deficiency tax of the Coombe Garment Company for the year 1918.

[fol. 34] (7) The Board erred in determining that the petitioners were liable for the total deficiency tax of the Coombe Garment Company for the year 1919.

(8) The Board erred as a matter of law in not finding that the collection of the deficiency tax from the transferees of

the assets of the Coombe Garment Company could only be accomplished by the joinder of all of the said transferees as parties defendant in an action in a court of equity.

(9) The Board erred in determining the liability of the petitioners to be greater than an amount equal to that portion of the total deficiency tax which the number of shares of the Coombe Garment Company owned by the decedent bears to the total number of shares of stock of the corporation issued and outstanding at the time of distribution and dissolution.

Wherefore your petitioners pray that this petition for a review by the United States Circuit Court of Appeals for the Second Circuit, of the decision, judgment and order of redetermination of the United States Board of Tax Appeals, be granted.

Dated New York, Sept. 24th, 1929.

Seymour Phillips, Petitioner.

[fol. 35] *Duly sworn to by Seymour Phillips. Jurat omitted in printing.*

[fol. 36] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF PETITION FOR REVIEW—Filed Oct. 2, 1929

To C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue, Attorney for Respondent:

Please take notice that on the 30th day of September, 1929, a petition was filed with the United States Board of Tax Appeals for a review of the decision of said Board in the above-entitled cause by the United States Circuit Court of Appeals for the Second Circuit, a copy of which said petition for review is herewith served upon you.

Herman Goldman, 120 Broadway, New York, New York, Attorney for Petitioners.

[fol. 37] Service of the foregoing notice and service of a copy of the petition for review mentioned in said notice is acknowledged this 30th day of September, 1929.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, December 14, 1929, the foregoing petition for review, notice of filing and proof of service certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 38] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed Nov. 25, 1929

To the Clerk of the Board of Tax Appeals:

You will please prepare within sixty days from the date of the filing of the Petition for Review in the above entitled case and transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, certified copies of the following documents:

1. The docket entries of proceedings before the Board.
2. Pleadings before the Board (amended petition and amended answer).
3. Findings of fact, opinion and decision of the Board.
4. Petition for Review.

[fol. 39] The foregoing are to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Herman Goldman, Attorney for Petitioners. Office & P. O. Address: 120 Broadway, Borough of Manhattan, City and State of New York.

To C. M. Charest, Esq., General Counsel, Bureau of Internal Revenue.

Service of the within præcipe accepted this 22nd day of November, 1929.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, December 14, 1929, the foregoing præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ANNIE G. PHILLIPS et al., as Executors of the Estate of I. L. Phillips, Deceased, Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Appeal from an Order of the United States Board of Tax Appeals

OPINION

This proceeding involves deficiencies in income and profit taxes for the years 1918 and 1919, which the Commissioner of Internal Revenue assessed against a dissolved corporation and proposes to assess against a former stockholder of said corporation, who received on distribution of the corporate assets liquidating dividends larger than the amount of said deficiency taxes. The proposed assessment having been confirmed by an order of the Board of Tax Appeals, the executors of said stockholder, deceased, have petitioned for review. Affirmed.

The findings of fact and opinion of the Board appear in 15 B. T. A. 1218. The facts were stipulated. In September, 1919, Coombe Garment Company, a Pennsylvania corporation, was dissolved, and all its property was distributed among its eleven stockholders in proportion to [fol. 41] their respective holdings. Prior thereto the corporation had filed its returns and paid the taxes therein indicated for the calendar years 1918 and 1919. Subsequently a deficiency tax for each of said years was assessed against the corporation, and on June 16, 1926, the Commissioner notified I. L. Phillips, a former stockholder, that he proposed to assess against him as a "transferee" the entire amount of said deficiency taxes, pursuant to the provisions of section 280 of the Revenue Act of 1926 (44 Stat. 61; 26 U. S. C. A. sec. 1069). Said Phillips had received as liquidating dividends more than the amount of said taxes. No proceeding was initiated by the Commis-

sioner to assess or collect from any other stockholder. The executors of the estate of I. L. Phillips, deceased, petitioned the Board of Tax Appeals for a redetermination, but the Board confirmed the Commissioner's action.

Herman Goldman, for Appellants; Milton J. Levitt and Arthur Rothstein, of Counsel.

G. A. Youngquist, Assistant Attorney General, for Respondents; Sewall Key, John Vaughan Groner, Special Assistants to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue; Allin H. Pierce, Special Attorney, Bureau of Internal Revenue, of Counsel.

SWAN, Circuit Judge:

The appellants first challenge the constitutionality of section 280 of the Revenue Act of 1926; and secondly assert, that even if it be constitutional, their liability is only for a [fol. 42] pro rata share of the corporation's unpaid taxes.

Before passing to a consideration of these primary contentions it is necessary to dispose of a jurisdictional question, although not urged by the appellee. That question is whether a "transferee" is given the same right of judicial review of the Board's decision as is a "taxpayer". The statute provides for review by the court upon petition filed by "either the commissioner or the taxpayer" (26 U. S. C. A. sec. 1224); and it may be argued that by the language of section 280 Congress has differentiated between taxpayers and transferees by referring to the liability of the latter as "the liability, at law or in equity of a transferee of property of a taxpayer, in respect of the tax • • • imposed upon the taxpayer." But section 280 directs that the liability of the transferee shall be "assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title",—language which indicates, in our opinion, a clear intention to give to a transferee the same right as a taxpayer in respect to seeking a review of a proposed assessment by appeal to the Board of Tax Appeals and to the court. The precise point now under consideration was discussed in Routzahn v. Tyroler, 36 F. (2d) 208 (C. C. A. 6), and we agree with the view there expressed that the statutory definition of "taxpayer" (26 U. S. C. A. sec. 1262) is not seriously inaccurate as

applied to a transferee. This view finds added support in the language of the Supreme Court in United States v. Updike, decided May 19, 1930, where Mr. Justice Sutherland said:

[fol. 43] "Indeed, when used to connote payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

We conclude, therefore, that the appellants are rightfully here.

The constitutionality of section 280 is attacked upon the ground (1) that it confers judicial powers upon an administrative officer, and (2) deprives the transferee of his property without due process of law in violation of the Fifth Amendment. There is not lacking judicial authority in support of these contentions. Owensboro &c. Co. v. Lucas, 18 F. (2d) 798 (D. C. W. D. Ky.); Mid-Continent Petroleum Corp. v. Alexander, 35 F. (2d) 43 (D. C. W. D. Okla.); cf. Felland v. Wilkinson, 33 F. (2d) 961, 962 (D. C. W. D. Wis.). But see Routzahn v. Tyroler, supra. See also "The Constitutionality of the Transferee Provisions of the Revenue Acts", 29 Columbia L. Rev. 1052. In our opinion the section is valid. Due process is afforded because a hearing is provided before this court in the event of dissatisfaction with the determination of the Board of Tax Appeals, to say nothing of the alternative remedy of an action to recover the tax after payment. Nor is judicial power improperly delegated. That the collection of taxes by summary process is a remedy which antedates the Constitution and does not violate its provisions as to the separation of powers, is a doctrine too well established to require the citation of authorities. Nor is such summary procedure confined to the [fol. 44] collection of taxes qua taxes. It extends to collection of a debt due the government from a defaulting collector of customs and his sureties. Murray's Lessee v. Hoboken Land &c. Co., 18 How. 272. Within the principles ably discussed by Mr. Justice Curtis in that case, we think the procedure provided by section 280 is sustainable. That section, as said by the Supreme Court in United States v.

Updike, supra, "prescribes a mode of procedure against transferees of the property of a taxpayer". There is every reason for having the preliminary steps administrative and summary because that is the only efficient method of collecting promptly the tax due from the transferor, when he has made direct collection impossible by transferring his property. Enforcement of the transferee's liability by court process had been found ineffective to prevent loss of revenue and tax evasion. So Congress provided a new and summary procedure. See House Rep. No. 2, 70th Cong., pp. 31-32. That the obligation of the transferee is not directly and primarily to pay his own tax, but is based upon his "liability at law or in equity" to pay the tax of another should make no difference, in our opinion, in the validity of the procedure Congress has provided for collection. The Commissioner's determination of the transferee's liability, and the extent of it, is not different in kind from the auditing of the amount due from the defaulting collector in Murray's lessee. That which is paid results in the end in the collection of a tax, though from the transferee rather than from the person originally liable. It is a method of [fol. 45] collecting revenue; and, though summary, it does not operate so harshly upon the transferee, in view of the recourse he may have to the courts to correct administrative errors, as to fall outside the pale of permissible legislation.

Having determined that the section is constitutional, it becomes unnecessary for us to consider the Commissioner's contention that by availing of its provisions in seeking a redetermination by the Board of Tax Appeals, the appellants are estopped from questioning its constitutionality—a doctrine which was accepted in Cappellini v. Commissioner, 14 B. T. A. 1269, and followed by the Board in the decision now under review, but disapproved in Routzahn v. Tyroler, supra.

There remains the question of the extent of the appellants' liability. They contend that it is limited to their decedent's pro rata share of the corporation's tax, while the Commissioner contends that each stockholder is severally liable up to the amount of the liquidating dividend he received. The Commissioner's contention is correct. Bartlett v. Drew, 57 N. Y. 587, is precisely in point. This was an action in the nature of a creditor's bill brought by a judg-

ment creditor of a New Jersey corporation, after the return of an execution unsatisfied, to reach money distributed by the corporation to Drew, a large stockholder and a resident of New York. Drew contended that the suit could not be maintained against him alone, but all stockholders must be brought in to the end that each might contribute his proportion to the payment of the plaintiff's debt. The court rejected this contention, saying:

[fol. 46] "* * * It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. (2 Story Eq. Jur., sec. 1252.) Where stock and property has been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors" (page 589).

* * * * * * *

"* * * The defendant, Drew, is found to be in possession of the assets of the dissolved or insolvent corporation more than sufficient to pay the plaintiff her demand, and the law requires that he should pay it" (page 591).

This case was followed in Hastings v. Drew, 76 N. Y. 9, and Singer v. Hutchinson, 183 Ill. 606. See also, Kimbrough v. Davies, 104 Miss. 722; Williams v. Commercial Nat. Bank, 49 Ore. 492; Fletcher, Corporations, sec. 5060 and sec. 4127, where it is said that the weight of authority is in accord. The Bartlett case was cited with approval in Hatch v. Dana, 101 U. S. 205, 212, which allowed recovery by a creditor from a single stockholder of the latter's unpaid stock subscription, for which no call had been made by the corporation, against defendant's objection that all stockholders should be joined.

It is true that by cross bill the stockholder who is sued may bring in other stockholders and obtain contribution. Fletcher, id. sec. 4102. This is a matter of procedure to

avoid a multiplicity of suits and do complete justice between all the parties concerned. But the extent of the defendant's liability to the creditor is not diminished by the fact that defendant may have a right of contribution, which, for convenience, may be enforced in the creditor's [fols. 47 & 47½] suit rather than in an independent action. This is demonstrated beyond question, to our minds, by appellants' concession that if other stockholders are insolvent or beyond the jurisdiction, the creditor need not pursue them and the liability of stockholders who are parties will be correspondingly increased beyond their pro rata shares of the creditor's claim. The liability of one who receives corporate assets impressed with a trust for payment of corporate debts, extends to the full value of such assets. That there may be rights of contribution if those assets are taken from him does not diminish his liability, nor concern the creditor. See Hatch v. Dana, 101 U. S. 205, 214; Marsh v. Burroughs, 1 Woods 463, 468. If United States v. Armstrong, 26 F. (2d) 227 (C. C. A. 8), can be thought contrary to this conclusion, we cannot yield to it.

Section 208 of the Revenue Act of 1926 permits the Commissioner to collect from a transferee according to his "liability" and without regard to rights of contribution he may have against others. With such rights the government is not concerned in its collection of revenue. They are not affected by the Commissioner's action and may be prosecuted in the proper forum. The order of the Board is affirmed.

[fol. 48] In United States Circuit Court of Appeals, Second Circuit

Annie G. Phillips et al., as Executors, etc., Petitioners,

v.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

Judgment—Filed June 16, 1930

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 49] [File endorsement omitted.]

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,377. U. S. Circuit Court of Appeals, Second Circuit. Term No. 455. Annie G. Phillips, Arthur L. Phillips, Seymour Phillips, and Abraham S. Phillips, executors of the estate of I. L. Phillips, deceased, petitioners, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed September 13, 1930. File No. 35,377.

FILE COPY

No. 455

SEP 13
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM—1930.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased (Petitioners below),

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE (Respondent below),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HERMAN GOLDMAN,
ELKAN TURK,
MILTON J. LEVITT,
Counsel for Petitioners.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 3330-1-4

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Supreme Court of the United States

OCTOBER TERM—1930.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased (Petitioners below),

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE (Respondent below),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Annie G. Phillips, Arthur L. Phillips, Seymour Phillips and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, deceased, alleges and respectfully shows to this Honorable Court:

The proceeding which this petition seeks to review is a determination by the Circuit Court of Appeals for the Second Circuit, affirming an order of the United States Board of Tax Appeals, which in turn affirmed a determination by the Commissioner of Internal Revenue, whereby there was assessed against I. L. Phillips deficiencies of $277.75 and $9,124.68 for the years 1918 and 1919, respectively, in the Federal Income and Profits

Taxes of the Coombe Garment Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania.

The proceeding involved the constitutionality of Section 280 of the Revenue Act of 1926, quoted in the appendix to the accompanying brief, and, if the act be constitutional, the extent of the liability thereunder of the stockholder of the corporation who received part, but not all, of the assets of the corporation upon dissolution.

The facts were stipulated between the parties:

The Coombe Garment Company, a Pennsylvania corporation having its principal place of business in Philadelphia, filed its income and profits tax return for the calendar year 1918 on June 16, 1919, and its return for the year 1919 on March 6, 1920.

On September 27, 1919, the Coombe Garment Company, having legally dissolved, made distribution to its stockholders of a liquidating dividend. On that date, the total outstanding capital stock was five hundred shares of a par value of $100 each, of which I. L. Phillips owned 25 per cent., the remaining 75 per cent. being owned in varying amounts by eleven other stockholders. The entire liquidating dividend aggregated $68,558.35, of which Mr. Phillips' *pro rata* share was $17,139.61.

In February, 1925, the Commissioner of Internal Revenue assessed against the corporation an additional tax of $277.75 for the year 1918, and in December, 1924, an additional tax of $9,124.68 for the year 1919. Of the additional tax assessed against the corporation for the year 1918, there has been paid the sum of $96.07, leaving the sum of $9,306.36 due as additional taxes upon the income of the corporation for the years 1918 and 1919,

and your petitioners do not draw this amount into question in this proceeding.

On June 16, 1926, the Commissioner of Internal Revenue mailed to I. L. Phillips at New York City a notice to the effect that pursuant to the provisions of Section 280 of the Revenue Act of 1926, the liability of Mr. Phillips for the unpaid tax of the Coombe Garment Company had been assessed in the sum of $9,306.36, which is the entire amount of the company's unpaid taxes for the years 1918 and 1919. The Commissioner did not assess the balance of this tax, or any part of it, against any other former stockholders of the Coombe Garment Company, nor was any effort made by the Internal Revenue authorities to collect any part of this deficiency from any of the other stockholders.

The questions which the petitioners desire this Court to pass upon, are the following:

1. Does Section 280 of the Revenue Act of 1926 violate the constitutional principle of the separation of powers, in that it embodies a delegation of judicial power to the Commissioner of Internal Revenue, an executive officer?

2. Does Section 280 of the Revenue Act of 1926 violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States, in that it authorizes the officers of the Bureau of Internal Revenue to make summary assessment and collection of legal and equitable liabilities?

3. If the summary procedure with respect to such liabilities may be justified by the conclusion that the amount assessed is a tax, then is not the tax unconstitutional because

(a) it is not based upon income of the taxpayer; and

(b) it is not apportioned among the several States according to their respective numbers?

4. If the amount thus assessed is to be treated as a tax based upon income of the original taxpayer, and for that reason need not be apportioned among the several States according to their respective numbers by reason of the Sixteenth Amendment of the Constitution, is not the tax nevertheless unconstitutional for the reason

(a) that it is not uniform throughout the United States and

(b) that the determination of the amount of the assessment is delegated by the Congress to the legislatures of the several States.

5. Is it competent for Congress to authorize a tax based upon an income which is neither

(a) apportioned among the several States according to their respective numbers; nor

(b) uniform throughout the United States?

6. If the procedure authorized in Section 280 of the Revenue Act of 1926 is constitutional, does it justify the seizure of the entire amount of the tax involved from a single transferee, or must it be apportioned among all transferees similarly situated in accordance with the amounts of the property transferred to them respectively?

Questions 4 and 5 above set forth are predicated upon the rule of the conflict of laws that the liability of stockholders of a corporation in dissolution must be determined by the law of the State of incorporation. Thus there are forty-eight rules for determining the liability at law or in equity of such a stockholder, and forty-eight measures of the amount which the Commissioner is authorized to assess.

The importance of these questions from the standpoint of both the taxpayers and the Government, is at once apparent, and the decision of these questions is bound to have a far-reaching result. If it should be determined that the amounts thus assessed are taxes, and that they need neither be uniform throughout the land, nor apportioned among the several States according to their numbers, then it would seem to follow that the result of the Sixteenth Amendment has been to permit an income tax which might apply one rate to one State or one portion of the nation, and another rate to another State or other portions of the nation. If it should be held that the amount due is not a tax, but rather a mere liability owing to the Government by reason of the receipt of property from a taxpayer, then if the procedure provided for in Section 280 of the Revenue Act of 1926 is justifiable under the Constitution, there would seem to be no reason why, with equal appropriateness, the Government might not be justified in adjusting every claim of a civil nature which it has against any person by a seizure of his property, leaving it to him thereafter to have his rights adjudicated in an action based upon the illegality of the seizure. It is of the utmost moment that the limits upon such summary seizure be promptly and definitely set, and no tribunal other than this Honorable Court can accomplish that purpose.

As shown in the accompanying brief, District Courts in Circuits other than the second, have held the law unconstitutional.

With regard to Question No. 6 also there has been judicial conflict. As above noted, the liability at law or in equity of the transferee in the case of a corporate dissolution would depend, strictly speaking, upon the law of the State of incorporation, and it must be admit-

ted that in some of the States the transferee stockholder might be legally liable for the entire amount of the tax in a proper action brought. Nonetheless, in all of the cases in the District Courts in which this question arose, and in which the Government sought to enforce the liability at law or in equity of the transferee stockholder by suit rather than by summary process, the District Courts and the Circuit Court of Appeals for the Eighth Circuit have held each stockholder only for his *pro rata* share of the tax. This holding has proceeded upon the ground that the Equity Rules require the courts of the United States to render such judgment as will be equitable to the actual defendants if all of the proper defendants are not brought before the Court.

It is to be noted that the Court below reached the conclusion that I. L. Phillips was liable for the entire amount of the tax upon the authority of a case decided in the courts of the State of New York in which the liability of a stockholder of a New Jersey corporation was at issue.

It is submitted that no different rule should apply where the liability in equity is assessed by the Commissioner of Internal Revenue, than would apply had the Commissioner proceeded in accordance with the usual course, by suit in the Federal Court of Equity.

Petitioners believe that none of the questions above propounded have been involved in any case brought before this Honorable Court.

Petitioners respectfully present herewith their brief in support of this petition.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Circuit Court of

Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court: "Annie G. Phillips, Arthur L. Phillips, Seymour Phillips and Abraham S. Phillips, Executors of the Estate of I. L. Phillips, deceased, Appellants, against Commissioner of Internal Revenue, Appellee", to the end that said case may be reviewed and determined by this Court, as provided by law, and that your petitioners have such other and further relief and remedy in the premises as to this Court may seem just, and that said judgment of the Circuit Court of Appeals may be modified by this Honorable Court.

ANNIE G. PHILLIPS,
ARTHUR L. PHILLIPS,
SEYMOUR PHILLIPS and
ABRAHAM S. PHILLIPS,
As Executors of the Estate
of I. L. Phillips, Deceased,
By SEYMOUR PHILLIPS,
One of the Executors,
Petitioners.

ELKAN TURK,
Counsel for Petitioners.

State of New York,
County of New York—ss.:

SEYMOUR PHILLIPS, being duly sworn, deposes and says that he is one of the Executors of the Estate of I. L. Phillips, and is one of the petitioners herein; that he has read the foregoing petition, and the same is true as he verily believes.

SEYMOUR PHILLIPS.

Sworn to before me this
11th day of September, 1930.

JOHN S. QUINN,
Notary Public,
Kings County.
Clerk's No. 13, Register's No. 1007.
Certificate filed in New York County,
Clerk's No. 15, Register's No. 1211.
Certificate filed in Bronx County,
Clerk's No. 1, Register's No. 3101.
Certificate filed in Queens County,
Clerk's No. 319, Register's No. 6330.
Certificate filed in Nassau County.
Certificate filed in Suffolk County.
Commission expires March 30, 1931.

I hereby certify that I have read the foregoing petition and in my opinion is well founded and deserves the favorable consideration of this Court.

ELKAN TURK,
Counsel.

Supreme Court of the United States

OCTOBER TERM—1930.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased (Petitioners below),

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE (Respondent below),

Respondent.

BRIEF IN SUPPORT OF PETITION OF ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS AND ABRAHAM S. PHILLIPS, AS EXECUTORS OF THE ESTATE OF I. L. PHILLIPS, DECEASED, FOR A WRIT OF CERTIORARI.

Statement.

The opinion of the Circuit Court of Appeals, embodying the determination of which a review is here sought, was handed down on June 9, 1930, and it has not yet been published in the official reports. It appears, however, at page 8774 of the 1930 Federal Courts Volume of the Commerce Clearing House. The opinion of the Board of Tax Appeals appears at 15 B. T. A. 1218. The petitioners respectfully request the Court to take jurisdiction by certiorari under the provisions of Section 1003

of the Act of February 26, 1926, c. 27, Section 1003, 44 Stat. 110 (26 U. S. C. A. 1226) which in turn refers for procedure to Section 24A of the Judicial Code (28 U. S. C. A. 347). Both of these statutes are quoted in the appendix.

The basis of the petition is that important questions relating to the Revenue Laws of the United States, and the interpretation and constitutionality thereof, are involved, concerning many of which there has been conflicting opinion in the inferior courts, and none of which have been passed upon by this Court. The determination of the Court below appears to be in conflict with the determination reached on an analogous question in the Eighth Circuit.

Statement of the Case.

The facts appear in the stipulation of the parties (R. 70).

On September 27, 1919, the Coombe Garment Company, a Pennsylvania corporation having its principal place of business in Philadelphia, having legally dissolved, distributed its assets to twelve stockholders in liquidation (R. 71-75). On that date, the company had outstanding and issued capital stock amounting to fifty thousand dollars, which was represented by 500 shares, each having a par value of $100 (R. 71). Of the total outstanding capital stock of the company, I. L. Phillips owned approximately 25%, the remaining 75% being owned in varying amounts by the eleven other stockholders (R. 72-74). Mr. Phillips received the sum of $17,139.61, as his pro rata share of the entire liquidating dividend aggregating $68,558.35 (R. 72-74). In February, 1925, the Commissioner of Internal Revenue

assessed an additional tax against the Coombe Garment Company of $277.75 for the year 1918, and in December, 1924, an additional tax of $9,124.68 for the year 1919 (R. 74). Of the additional tax assessed against the corporation for the year 1918, the sum of $96.07 was paid, leaving the sum of $9,306.36 due as additional taxes upon the income of the corporation for the years 1918 and 1919 (R. 75).

Thereafter, and on June 16, 1926, I. L. Phillips, received notice of the assessment against him, as a single amount, of the sum of $9,306.36, which is the aggregate of the deficiencies for 1918 and 1919 assessed against the Coombe Garment Company (R. 75-76).

The Commissioner has not assessed this deficiency tax, or any part of it, against any other former stockholder of the Coombe Garment Company, nor has any effort been made by the Internal Revenue authorities to collect any part of this deficiency from any of the other stockholders (R. 78-79).

Specification of Errors.

Petitioners contend that the Court below erred:

(a) in holding that the summary procedure prescribed in Section 280 of the Revenue Act of 1926, constitutes due process of law;

(b) in holding that the delegation to the Commissioner of Internal Revenue of the power to determine the liability of a transferee at law or in equity, does not involve a violation of the constitutional principal of the separation of powers; and

(c) in holding that the summary procedure prescribed by Section 280 of the Revenue Act of

1926 could be justified by designating the amount to be collected from the transferee a tax, without at the same time holding that such tax, assessed and levied as provided for in Section 280, is without justification or warrant in either the First Article of the Constitution of the United States, or the Sixteenth Amendment of the Constitution of the United States.

Summary of Argument.

From petitioner's point of view, the Government with regard to Section 280 of the Revenue Act of 1926 (quoted in the appendix), must find itself impaled on either of the horns of a dilemma. Either the amount sought to be assessed is or it is not a tax. If it is not a tax, then it is an amount owing under the provisions of State laws by reason of the receipt of property from the taxpayer. In that case, no constitutional justification can be found for passing over the usual procedure for determining the exact quality and character of the transfer from the taxpayer, the incidents thereto, and all of the circumstances which should be determined by the orderly process of Court determination before the transferee's property is subject to seizure. The executive branch of the Government is not vested by the Constitution with the power to make such determinations. If, on the other hand, the amount sought to be collected is a tax, then authority therefor must be found in the Constitution. It certainly is not a tax based upon the income of him against whom collection is sought, and hence appears to be beyond the scope of the Sixteenth Amendment. If collection is not within the scope of the Sixteenth Amendment, then it should be either apportioned among the

several states, according to their respective numbers, as a direct tax and under Article I, Section 2, Clause 3 of the Constitution, should be uniform throughout the United States in accordance with Article I, Section 8, Clause 1 of the Constitution, as an excise or impost.

Of course there is no apportionment or pretense of apportionment, nor can there be geographical uniformity, for by the conflict of laws, the liability at law or in equity of a transferee of a corporation is dependent upon the law of the State of incorporation.

If it be said that the tax is an income tax because based upon the income not, it is true, of him against whom the assessment is made, but of his transferor, then even a more serious question of constitutionality arises, to wit: Has the Sixteenth Amendment, while taking income taxes out of the requirement for apportionment in accordance with population, also held it free from the requirement of uniformity, so that the Congress might levy an income tax at one rate against the residents of one state and at another rate against residents of other states?

In any event the amount of each assessment must depend on the laws of the State of incorporation which may be changed from time to time. Congress has thus delegated to State legislatures a part of its tax laying function.

If, in spite of the foregoing considerations, Section 280 be held constitutional, the proper amount of the liability remains to be considered. No general rule, that the transferee is liable for the entire amount of the tax against the transferor, can be justified in view of the principle of the conflict of laws involved. The rule applied by the Equity Courts of the United States, which have had the same principle before them, requires that each transferee should only be subjected to a levy in proportion to the property of the taxpayer received by him.

Argument.

POINT I.

If the amount assessed against Phillips be not a tax, then the summary provisions of Section 280 violate the due process clause of the Fifth Amendment.

The hypothesis here assumes that the amount assessed against Phillips is what the statute in plain language calls it, *i. e.*, a liability in law or in equity. In this connection we may properly contemplate the entire scope of Section 280 without limitation to the specific facts in the case at bar. Phillips was a transferee because he was a stockholder of the taxpayer corporation in dissolution. With like reason, however, might the section be used against one whom the Commissioner believes has taken the property of a taxpayer in fraud of his creditors. The operation of the section must inevitably involve determinations by the Commissioner of intricate questions of law and fact, such as the adequacy of a consideration paid, the intent of the parties in making and receiving the transfer, the existence of fraud. Since the liability thus determined may be one at law as well as in equity, the Commissioner would thus be in a position to substitute himself for both court and jury. The point here made is supported by the following language quoted from *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 Fed. (2d) 798 (U. S. D. C., W. D. Ky.):

> "Liabilities such as those herein enumerated are the liabilities referred to in section 280, and heretofore have always been enforced by judicial

proceedings. The matters involved are essentially judicial in character, and Congress is without power to withdraw them from judicial cognizance and confer them upon the executive department, and the attempt in section 280 so to do amounts not only to a denial of due process of law, but also is violative of section 1 of article 3 of the Constitution, which vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish."

That case arose before the Congress had adopted Section 604 of the Revenue Act of 1928, 26 U. S. C. A. 2604, which specifically prohibited a suit for an injunction to restrain the Collector from enforcing liabilities under Section 280. The Court held that the liabilities under Section 280 were not, in the absence of such legislation, within the meaning of Section 3224 of the Revised Statutes which prohibited an injunction against the collection of a tax. In this connection, the Court said:

"The liability of the taxpayer as such grows out of his relationship to the government. It is an enforced contribution imposed upon him or his property for the support of the government. It is not based upon any contract, nor is it the result of any voluntary obligation assumed by him. When the government undertakes to collect this liability, however, from a third party against whom it was not originally assessed, the liability arises from entirely different considerations. The liability of such a person is a contractual one, either express or implied. If he contracts with the taxpayer to pay the tax, the government's right to proceed against him is upon the theory that the contract was made for its benefit. If he receives prop-

> erty from the taxpayer without paying therefor, or under such conditions as in good conscience would require it to be devoted to paying the obligations of him from whom it was received, then the law implies a promise on his part to pay."

Indeed, if the Government can enforce in a summary manner such an indirect liability as that of a transferee, then there appears to be no reason why the Government should in any case be required to follow the orderly procedure of the Courts in collecting and enforcing any claim which it may have.

The Court below relied upon the case of *Murray's Lessee et al.* v. *Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272. In that case, however, the summary remedy was exercised against a Collector of the Customs, a public officer, who must certainly have accepted his office so conditioned that the statutory remedies against him were a part of his contract of employment. The case of *Murray's Lessee* is notable for its learned examination of the history of summary procedure for the enforcement of liabilities to the government, both in England and in this country. The review of this history, as presented by Mr. Justice Curtis, would seem convincing that since the adoption of the Magna Charta, no such liability as that with which I. L. Phillips is here charged, could have been summarily enforced either in England or in this country.

POINT II.

If the amount assessed against Phillips be not a tax, then the provisions of Section 280 of the Revenue Act of 1926 violate the constitutional principle of the separation of powers.

Under this point again the hypothesis is that Phillips has been taxed merely because of his legal and equitable liability resulting from his receipt of moneys upon the liquidation of the Coombe Garment Company. The determination of the amount of that legal or equitable liability may well involve the decision of numerous questions of law and of fact. The distributee-stockholder may have setoffs and counterclaims against the liability. Indeed, he may claim to be a creditor of the corporation for an amount in excess of his distribution. All of these questions the Commissioner of Internal Revenue, is, by Section 280, authorized to adjudicate. This means that he must determine the questions of fact, and that he must interpret the corporation statutes of the forty-eight states, and must, in addition, decide every question between the corporation and the distributee-stockholder, which may involve other state statutes, *i. e.*, statutes of fraud, statutes of limitation and the like.

It does not help the matter that an appeal is allowed from the determination of the Commissioner to the Board of Tax Appeals (itself an administrative body) and to the Circuit Courts of Appeals. The fact still remains that the original judicial power is vested by the statute in a subordinate of the executive branch of the Government. Such violation of the principal of the separation of powers has always been condemned.

In *Murray's Lessee et al.* v. *Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272, Mr. Justice Curtis, in commenting upon the division of the powers of government, said at page 284:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

This principle has never been departed from by this Court, and as recently as in *Springer* v. *Government of the Philippine Islands*, 277 U. S. 183, Mr. Justice Sutherland said at page 209:

> "And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism."

The Court is further respectfully referred to *Meyers* v. *U. S.*, 272 U. S. 52, and *Hampton & Co.* v. *U. S.*, 276 U. S. 394, 406.

More need not be said with regard to the complicated issues of law and fact which the Commissioner may have presented to him pursuant to the jurisdiction granted to him in the statute under consideration, to emphasize the utter dissimilarity between the judicial task imposed upon him in such legislation, and the functions performed by such administrative bodies and officers as the Interstate Commerce Commission, the Federal Trade Commission, the Commissioner of Immigration and the Commis-

sioner of Patents. These bodies and officers are substantially only fact-determining bodies and officers who have had the rule for the application of the facts supplied by the legislature. Certainly in none of their duties is there involved the determination of disputes between private individuals. On the other hand, the Commissioner of Internal Revenue may, under Section 280 of the Revenue Act of 1926, be called upon to determine the amount of indebtedness and liability as between transferor and transferee.

The matter has been decided in other Federal Courts in a manner directly opposite to the decision in the Court below.

In *Felland* v. *Wilkenson*, 33 Fed. 2d 961 (U. S. D. C., W. D. Wisc.), the Court said:

> "The cogent reasoning of Judge Dawson leading to his conclusion that section 280 of the Act of 1926 (26 U.S.C.A. section 1069), in so far as it assigns to administrative officers the power to determine the liability of a transferee of a taxpayer, is invalid as a grant of judicial power, seems well nigh inescapable."

In the following cases also has it been held that Section 280 violates the principle of separation of powers:

Mid-Continent Petroleum Corporation v. *Alexander*, 35 Fed. 2d 43, 46 (U. S. D. C., W. D. Okla.);

Owensboro Ditcher & Grader Co. v. *Lucas*, 18 Fed. 2d 798, 801 (U. S. D. C., W. D. Ky.).

POINT III.

If the amount assessed against Phillips be a tax, then the imposition thereof was beyond the constitutional powers of the Congress.

Three constitutional provisions apply to the power of Congress to levy and collect taxes.

Article I, Section 2, Clause 3 provides that direct taxes must be apportioned among the several states according to their respective numbers.

Article I, Section 8, Clause 1 provides that all duties, imposts and excises shall be uniform throughout the United States.

After the decision of this Court in *Pollack* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, in which it was determined that an income tax is a direct tax, the Sixteenth Amendment was adopted in which taxes upon incomes were authorized without the necessity for apportionment.

It seems unnecessary to argue at length that the assessment against Phillips was not based upon any income which he received. If it be a tax, it is therefore a direct tax, not based upon income and not apportioned among the States in accordance with their numbers. Certainly, it does not seem to be an excise or an impost; but if it be such, it cannot be sustained, for it is not uniform geographically throughout the United States, depending, as it does, upon the laws of the forty-eight separate states.

On the other hand, if, by any chance, it may be designated a tax upon income because based upon the income

of the distributing corporation, then a new constitutional question is presented which the petitioners believe has never been presented to this Court. This question follows: May the Congress levy a tax upon incomes which is neither apportioned among the several states in accordance with their numbers, nor uniform throughout the United States? The express language of the Sixteenth Amendment seems to go no further than to take income taxation out of the apportionment restriction originally imposed upon the power of Congress to lay direct taxes. It does not, in terms, subject the income tax to the constitutional limitation upon the power of Congress to lay imposts and excises, *i. e.*, it does not, in so many words, provide that income taxes must be uniform throughout the United States. Nonetheless, it is petitioners' position that such indeed is the intention and the effect of the Sixteenth Amendment. Petitioners' position is that the Sixteenth Amendment was not intended to enable, and cannot be given the effect of enabling the Congress to levy an income tax at one rate in New York and at another rate in California, and at varying rates throughout the land. Moreover since the legislatures of the several States may from time to time increase or decrease the transferees' liability in law or in equity, the legislation is invalid as delegating to the legislatures of the several States, powers confided by the Constitution exclusively to the Congress. Such delegation is invalid.

> Opinion of Justices, 239 Mass. 606;
> *Commonwealth* v. *Alderman*, 275 Pa. 483;
> *Santee Mills* v. *Query*, 122 S. C. 158.

We believe that under this point it is unnecessary to do more than to suggest the questions which we desire to argue fully if the certiorari herein be granted. That the point, however, has substance, is indicated by the language of this Court in *U. S.* v. *Updike*, 281 U. S. 489, 494.

POINT IV.

If Section 280 of the Revenue Act of 1926 is constitutional, a transferee stockholder of a corporation in liquidation should not be required to pay a proportion of the tax greater than the proportion of the property of the corporation which he received.

We have already indicated that pursuant to the law of the conflict of laws, the legal liability of a transferee-stockholder of a corporation in dissolution must be determined according to the laws of the state of incorporation. It is quite competent, however, for the Courts of the United States, sitting as courts of equity, to determine whether or not the amount to be collected should be the full amount which might be collected in an action at law in the courts of the state of incorporation. The question has not been submitted to this Court, but the Courts of inferior jurisdiction, to which the question has been presented, have, with the exception of the Court in the instant case, held that only a proportionate collection should be made.

In *U. S.* v. *Garcia et al.* (decided by the District Court for the Southern District of New York, January, 1928, not reported in the official reports, but reported at page 7804 of the 1930 Federal Courts Volume of the Commerce Clearing House), Judge Knox said:

> "Inasmuch, also, as the complainant has given no explanation of its failure to bring all of the stockholders of the company before the court, and it having been within the power of the Government to reach such stockholders, even though they

are non-residents of this district, I think the liability of such as are before me should be limited, as was done in *Wood* v. *Dummer, supra*. Therefore, the decree against them should be only for their contributory share of the tax, in the proportion which the stock held by them bore to the whole capital stock."

The following cases are among those which have upheld the principle here contended for:

U. S. v. *Armstrong*, 26 Fed. (2d) 227 (C. C. A., 8);
U. S. v. *Snook*, 24 Fed. (2d) 844;
Updike v. *U. S.*, 8 Fed. (2d) 913.

CONCLUSION.

The petitioners therefore submit that this is a proper case for the issue of a writ of certiorari.

Dated, New York, September 11, 1930.

Respectfully submitted,

HERMAN GOLDMAN,
ELKAN TURK,
MILTON J. LEVITT,
Counsel for Petitioners.

Appendix A.

§280 Revenue Act 1926 (26 U. S. C. A. 1069). Transferees and fiduciaries; liability same as in case of deficiency in tax; limitations for assessment; pending suits.

(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection and the provisions prohibiting claims and suits for refunds).

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter or by any prior income, excess-profits, or War-Profits Tax Act.

(2) The liability of a fiduciary under section 192 of Title 31 in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before February 26, 1926, but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after February 26, 1926.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the statute of limitations upon the assessment of a liability of a transferee or fiduciary shall, after the mailing of the notice under section 1048 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending February 26, 1926.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee and distributee (Feb. 26, 1926, c. 27, §280, 44 Stat. 61; May 29, 1928, 8:00 a.m. c. 852, §505 (a), 45 Stat. 870).

Appendix B.

26 U. S. C. A. §1226. Courts vested with jurisdiction; review; powers of reviewing court.

(a) The Circuit Court of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the board (except as provided in section 346 of Title 28); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 347 of Title 28.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the board is not in accordance with law, to modify or reverse the decision of the board, with or without remanding the case for a rehearing, as justice may require. (Feb. 26, 1926, c. 27, §1003, 44 Stat. 110.)

Appendix C.

28 U. S. C. A. §347 (Judicial Code, Section 240, amended). Certiorari to the circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme

Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930—NO. 455.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased,

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF.

HERMAN GOLDMAN,
Attorney for Petitioners.

ELKAN TURK,
BENJAMIN WIENER,
DONALD BOURNE,
Of Counsel.

THE COURT PRESS, INC., N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930—NO. 455.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased,

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF.

Statement.

This case is before this Court upon a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit to bring before this Court for review a judgment of the Circuit Court of Appeals (R. 28, 29) which affirmed an order of the United States Board of Tax Appeals (R. 17) deciding in favor of the Commissioner that an assessment in the aggregate amount of $9,306.36 should be made against I. L. Phillips, the petitioners' testator, as a transferee of Coombe Garment Company, Inc., as the result of deficiencies aggregating $9,306.36 ascertained against that corporation for the years 1918 and 1919 (R. 8, 9). Upon rendering its judgment the

Circuit Court of Appeals for the Second Circuit wrote an opinion which is reported in 42 Fed. (2d) 177.

Ground Upon Which Jurisdiction Is Invoked.

This Court has brought this proceeding before it by writ of certiorari pursuant to petition filed under Section 240-A of the Judicial Code (28 U. S. C. A. 347-a) and in accordance with the provisions of Sections 1002 and 1003 of the Revenue Act of 1926 (26 U. S. C. A. 1225 and 1226). *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716. The order of the Board of Tax Appeals was entered on April 3d, 1929 (R. 17), and the judgment of the Circuit Court of Appeals was filed June 16th, 1930 (R. 28).

Statement of the Case.

The facts as stipulated by the parties were incorporated in the decision as findings of fact (R. 14-16).

The Coombe Garment Company, Inc., was a Pennsylvania corporation, having its principal place of business in Philadelphia (R. 14). On June 16th, 1919, the Coombe Garment Company filed its income and profits tax return for the calendar year 1918 and on March 6th, 1920, it filed a like return for the calendar year 1919 (R. 14).

In the year 1919 there were eleven stockholders of the Coombe Garment Company, of whom I. L. Phillips, the petitioners' testator, was one, owning 25% of the stock (R. 15). The company had completely liquidated by September 27th, 1919 (R. 14). At the time of the liquidation the outstanding capital stock of the company

was $50,000, represented by 500 shares, each of the par value of $100 (R. 14, 15).

Between July 25th, 1919, and September 27th, 1919, a total amount of $68,558.35 was paid to the stockholders of the Coombe Garment Company, Inc., "in liquidating dividends" (R. 15), but the findings do not state in how many payments or in what amounts or upon what dates these "liquidating dividends" were paid.

In February, 1925, the Commissioner assessed against the corporation an additional tax of $277.75 for the year 1918 and in December, 1924, an additional tax of $9,124.68 for the year 1919 (R. 15). On account of this aggregate of assessment $96.07 has been paid, leaving a total of $9,306.36 which has been assessed against the Coombe Garment Company for the years 1918 and 1919 and which has not been paid (R. 15).

On June 16th, 1926, the Commissioner of Internal Revenue notified I. L. Phillips that he proposed to assess against him the entire amount of this aggregate of $9,306.36 (R. 15, 8-9). By this notice the Commissioner proposed to assess the entire of the unpaid taxes of the Coombe Garment Company against I. L. Phillips, and the Commissioner did not send to any other stockholder as a transferee of the assets of the Coombe Garment Company any similar notice nor make any effort to collect any part of this deficiency of the corporation's tax from any other stockholder (R. 16).

Of the entire assets of the Coombe Garment Company, amounting to $68,558.35, I. L. Phillips received in all $17,139.61 (R. 15) but in what instalments and at what times he received this sum does not appear in the record nor is it found.

Specification of Errors.

The petitioners contend that the Court below erred

(a) In holding that the grant of power to the Commissioner of Internal Revenue by Section 280 of the Revenue Act of 1926 is not unconstitutional as violative of the principle of the separation of powers.

(b) In holding that the grant to the Commissioner by Section 280 does not violate the rights of the alleged transferee under the Fifth Amendment of the Constitution of the United States in that it takes his property without due process of law.

(c) In holding that so far as the liability of an alleged transferee at law is concerned, the grant of power to the Commissioner of Internal Revenue to assess such liability is not violative of the Seventh Amendment of the Constitution of the United States.

(d) In holding that the provisions of Section 280 of the Revenue Act of 1926 do not unconstitutionally delegate to the legislatures of the several states the power to determine the liability of alleged transferees.

(e) In holding that if the assessment against a transferee may be justified as the assessment of a tax, such tax is not unconstitutional for lack of uniformity under the provisions of Article I, Section 8, of the Constitution.

(f) In holding that the amount of the entire tax could be assessed against I. L. Phillips.

Summary of Argument.

In the various stages of this proceeding as well as in numerous discussions relative to the subject of this review, those who have advocated the constitutionality of Section 280 of the Revenue Act of 1926 have proceeded at times upon the theory that the amount assessed was the amount of a tax and at times upon the theory that the amount assessed was what the statute literally calls it, "the liability, at law or in equity, of a transferee of property of a taxpayer". The argument of the petitioners here assumes that the amount attempted to be assessed against I. L. Phillips either was or was not a tax. The argument is that, viewed either way, Section 280 is unconstitutional. The outline of this argument follows:

A. If the amount proposed to be assessed against I. L. Phillips is not a tax but a liability in law or in equity, then Section 280 is unconstitutional, for

(1) The liability of one who receives property of a debtor is dependent upon innumerable questions of law and fact such as have from time immemorial been adjudicated by courts of law and courts of equity, and the determination of such questions is, within the provisions of Article III of the Constitution of the United States, a matter exclusively within the province of the constitutional courts provided that the parties are encompassed within Section 2 of Article III of the Constitution. The grant by the provisions of Section 280 to the Commissioner of Internal Revenue of the power summarily to assess this liability is an unconstitutional delegation of judicial power

to an administrative officer and offends against the constitutional principles of the separation of powers.

(2) The liability in law or in equity of a transferee of the property of a taxpayer is not a liability to the sovereign of such character as has ever either in this country or in England, at least since the days of Magna Charta, been enforced by execution or summary process before the amount thereof was determined by a court of record. Due process of law requires that the amount of this liability be first ascertained in a proper court before execution or warrant for the collection thereof should issue.

(3) The liability of the transferee of a taxpayer in many cases is a liability at law. Where the amount of such liability exceeds $20, the transferee is entitled to a trial by jury under the Seventh Amendment to the Constitution of the United States. As to liabilities at law, therefore, Section 280 is unconstitutional. So large a number of the cases, therefore, in which the section might operate would be barred by reason of the Seventh Amendment that the entire of Section 280 should be declared unconstitutional.

B. If the amount which the Commissioner assessed against I. L. Phillips is a tax, then Section 280 is unconstitutional for

(1) It imposes a tax liability which is neither apportioned among the several states according to their respective numbers, in accordance with Article I, Section 2, of the Constitution, nor uniform throughout the United States, in accordance with

the provisions of Article I, Section 8, of the Constitution. The attempt to treat the assessment against a transferee as a direct tax would be so abortive by reason of the want of apportionment that we assume no effort would be made in that direction. It may be contended, however, that, being based upon the income of the original taxpayer, the assessment against the transferee might be justified as an income tax. Passing over the proposition that it would be difficult to uphold such an income tax for the reason that it is not based upon the income of him against whom it is assessed, such tax would still be wanting in validity for the reason that it would not be uniform throughout the United States. The liability in law or in equity of a transferee of the property of a corporation is normally determined according to the law of the State which created the corporation. It will be demonstrated that there is great divergence in the laws of the several states as to the liability of a transferee of the property of a corporation. Hence, there is utter want of uniformity in the application of Section 280 if it be viewed as a tax.

(2) Section 280 delegates to the legislatures of the several states the power to determine the amount of the liability which will thus be assessed. As noted above under A (1), the amount of the liability is determined by the law of the State of incorporation. This law can be changed from time to time and indeed since the adoption of the 1926 Revenue Act in some cases has been changed by the legislatures of the several states. As it is changed, it will govern the liability of transferees who receive transfers thereafter. Thus Congress

has not fixed the amount of such liability but has delegated to the legislatures of the several states the power to fix it.

The argument is further, that if general equity principles should be held to govern then the liability of any stockholder should be limited to his *pro rata* share of the tax; and further that the findings of fact in the record support only a *pro rata* liability.

Finally, we contend that the arguments of unconstitutionality have not been waived by the appeal to the Board of Tax Appeals.

The Statute Involved.

The principal statute involved in this case is Section 280 of the Revenue Act of 1926 (26 U. S. C. A. 1069). This statute, so far as here material, is as follows:

> "(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection and the provisions prohibiting claims and suits for refunds).
>
> (1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter or by any prior income, excess-profits, or War-Profits Tax Act.

(2) The liability of a fiduciary under section 192 of Title 31 in respect of the payment of any such tax from the estate of the taxpayer.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax. * * *"

Argument.

POINT I.

Section 280 of the Revenue Act of 1926 violates the constitutional principle of the separation of powers.

In this point we proceed upon the theory that the liability against I. L. Phillips is not a tax but what the statute itself calls it and that which the notice sent by the Commissioner to Mr. Phillips obviously intended it to be, *i. e.*, the amount of Mr. Phillips' liability in law or in equity for a tax theretofore assessed against, but not collected from, the Coombe Garment Company, Inc.

The determination of such liability as here assessed against Phillips inherently involves a judicial determination of facts and a judicial determination of the laws which are to be applied and a judicial construction of those laws, and that such determination and construction is so fundamentally a matter of judicial concern that the Congress cannot, consistently with our constitutional system, vest such determination and construction in an administrative officer such as the Commissioner of Internal Revenue.

Perhaps at the outset we might consider some of the factors which the Commissioner must necessarily have

determined in the case of the assessment against Mr. Phillips. That these factors are all involved as a matter of law more fully appears in later points. The record discloses that the petitioners, as executors of Mr. Phillips are residents of the State of New York (R. 14). The record does not disclose where Mr. Phillips lived at the date on which the liability is purported to be assessed. The record discloses that the Coombe Garment Company is a Pennsylvania corporation (R. 14) and that Mr. Phillips received in several instalments the sum of $17,139.61 (R. 15). In what instalments he received these moneys or on what dates does not appear. It does not appear from the record whether Mr. Phillips received all of his instalments before the amount of the assets of the company were reduced below the amount of its liabilities. Certainly, if all distributions were made *pro rata*, the major portion of the distribution to Phillips was received before the corporation was reduced to a state of insolvency.

Upon this state of the record the Commissioner of Internal Revenue was required to decide in the first place whether the controlling law was a Federal law, the law of the state of Mr. Phillips' domicile or the law of the state of incorporation of the Coombe Garment Company. Assuming that the Commissioner decided that the governing law was the law of the state of incorporation, the Commissioner must then have determined what the law of Pennsylvania on the subject was; to what extent its statute law applied as creating a liability in law and to what extent any equitable liability survived the adoption of the statute; whether the limitation of time placed upon the stockholders' liability in Pennsylvania supersedes the limitation of time attempted to be provided in

the revenue laws of the United States. These are illustrative questions of law and of fact which are necessarily incident to the determination of the liability of a transferee in so simple a case as that presented here. It requires only a reference to adjudicated cases to afford convincing evidence that in most transferee cases the problems above suggested would be multiplied manifold. (*Owensboro etc. Co.* v. *Lucas*, 18 Fed. (2d) 798.)

Suppose a case of a transferee of the corporation involved in the case of *Thomas* v. *Matthiessen*, 232 U. S. 221. There the Commissioner would have to determine, in addition to all of the foregoing questions, whether he was entitled to the status of a California creditor or an Arizona creditor, and accordingly whether he was subject to the Arizona limitations of liability or the California provisions for liability. This determination, under the rulings of this Court, would also involve a question as to whether the particular stockholder involved had ever agreed to the corporation's doing business in California thus subjecting himself to California liability. To all these questions in many cases there will be added the difficulty which arises where the transferee gave value for the transfer. There the question of the amount of the value given and its adequacy must also be determined by the Commissioner of Internal Revenue. Likewise, it has been held by this Court (*United States* v. *Howland*, 4 Wheat (17 U. S.) 108), that where a claim is made by the United States against the transferee of a taxpayer and the transferee claims that the taxpayer was indebted to him, the United States must submit to an accounting between itself, the taxpayer and his transferee so that it may be determined first, how much the taxpayer owed the transferee, and secondly, how much the surplus above

this debt is in the hands of the transferee. This tripartite controversy, Section 280 places in the hands of the Commissioner of Internal Revenue.

Next we consider the effect of the statutes of the various states which affect the liability of a stockholder who receives property of a corporation. For use in connection with a later point we have attached to this brief as appendices an outline of the various state statutes affecting this liability. We call particular attention to the statute of Louisiana. Under this statute, before the stockholder can be resorted to by any creditor certain rights against the directors who made the distribution must first be exhausted. In exhausting these rights it must be determined what the intent and *scienter* of the various directors in making the distribution had been. These questions of intent and guilty knowledge are also, as we shall see in a later point, confided by Section 280 to the Commissioner of Internal Revenue for determination, and as well, under the Idaho law as whether the publication of notice was in accordance with the statute so that the period of limitations governing the filing of claims would be effective.

We believe that the above illustrations are sufficient to demonstrate that Section 280 clearly involves an invalid delegation of judicial power to an administrative officer.

The Constitution of the United States provides as follows:

"ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and

in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party; * * *."

The Constitution does not contain any mandatory provision that the executive, judicial and legislative branches of our government should be kept separate, but it has been determined judicially that such is the intendment of the Constitution and that a law to the contrary is invalid. Thus this Court in *Evans* v. *Gore*, 253 U. S. 245, said:

"The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers,—the legislative, the executive and the judicial,—in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others,

> and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative."

Particularly has it been held that the entire of the judicial power of the United States must be vested in the courts set up by and under Article III of the Constitution. Thus, in *Martin* v. *Hunter*, 14 U. S. (1 Wheat.) 304, 328, Mr. Justice Story said:

> "If, then, it is a duty of Congress to vest the judicial power of the United States, it is the duty to vest the whole judicial power, the language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the juris diction as to all; for the constitution has not singled out any class on which Congress are bound to act in preference to others."

The same thought was expressed in a different way by Mr. Justice Curtiss in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284, a case much relied upon by the Government:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not the subject of judicial determination."

Such being the law, it must then follow that if the de-

termination of the questions above suggested is within the judicial power of the United States it must be vested in the courts of the United States and cannot be constitutionally vested in any other body or officer.

The application of this general principle to Section 280 of the Revenue Act was upheld in *Owensboro, etc. Co.* v. *Lucas*, 18 Fed. (2d) 798 (D. C. W. D. Ky.); *Mid-Continent Petroleum* v. *Alexander*, 35 Fed. (2d) 43 (D. C. W. D. Okla.). This principle, however, has been combatted in government arguments, publications of commentators and in the opinion of the Court below, principally upon two grounds. The first ground is that discretionary power of various kinds has been delegated with the sanction of this Court in other cases to commissions, boards and executive officers. The second ground is that Section 280 goes no further than did the statute involved in the case of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272. We shall examine these two contentions successively.

No True Constitutional Judicial Power Can Be Delegated to an Administrative Body.

The argument frequently advanced that the powers vested in the Commissioner of Internal Revenue here are analogous to those vested by the Congress in the Federal Trade Commission, Interstate Commerce Commission, the Court of Customs Appeals and the like, is based upon the conception that this Court, in its recognition of the powers of those and similar bodies, has countenanced a whittling away of the body of judicial powers confided by the Constitution to the Supreme Court and the inferior courts created by Congress under

the Third Article of the Constitution; that the border between powers which are judicial on the one hand and legislative or administrative on the other has become so uncertain and indefinite that any given power may be placed on the one side or the other of the border as governmental convenience may require. (29 Columbia Law Review, 1052). We conceive that this point of view presents an improper understanding of the various decisions of this Court and that this Court has never departed from the rule laid down by Mr. Justice Story in *Martin* v. *Hunter, supra.*

There can be no doubt, of course, that the Congress, in the exercise of its powers to regulate interstate commerce and to regulate foreign commerce, to regulate immigration and the like, may, in the execution of those powers, employ agencies whose functions are seemingly judicial or quasi-judicial. *Ex parte Bakelite Corp.,* 279 U. S. 438. The powers which these bodies exercise, however, are merely the powers which the Congress itself might exercise were it practicable for that body to attend to the details of administration covering the entire area of the United States. As a matter of convenience, Congress does, through its agents, that which it could do as a body.

These agencies, however, do not perform judicial functions as those functions are defined and encompassed in and by the Third Article of the Constitution. This distinction between the legislative function, which is a forward-looking function, and the judicial function, which is a determination based upon that which is or has been, is clearly pointed out by this Court in *Keller* v. *Potomac Electric Co.,* 261 U. S. 428, where this Court held itself incapable, under the Constitution, of review-

ing the discretion exercised by the public utilities commission of the District of Columbia. In so refusing, the Court used this language:

> *"Such legislative or administrative jurisdiction, it is well settled, cannot be conferred on this Court either directly or by appeal.* The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day speaking for the Court in *Muskrat* v. *United States,* 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of the inferior courts of the United States, ordained and established by Congress under and by virtue of the third article of the Constitution, is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court, without real parties or a real case, *or to administrative or legislative issues or controversies."* (Italics ours.)

We also refer in this connection to *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452. In such case this Court and the constitutional courts can go no further than to determine whether the public utility commission has exceeded its statutory or constitutional powers or has made a mistake of law. The true distinction in such case between the legislative power and the judicial power was laid down in *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to

> exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind * * *."

The distinction between the two powers is possibly most clearly pointed by a comparison of the determinations made by this Court in *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, and *Wong Wing* v. *United States,* 163 U. S. 228. In the one case this Court held it competent for administrative officers to penalize steamship companies which had brought to this country for entry, aliens determined upon a medical examination to be afflicted with a loathsome disease, contrary to the statute; whereas in the other it refused to sanction as constitutional a law which permitted a United States Commissioner to imprison under a criminal statute and without a trial by jury Chinese found to be unlawfully within the United States. In the first case the Congress itself could have refused admittance to an alien and could have penalized anyone who attempted to bring him in contrary to the will of the Congress. In the latter case it was competent for the Congress to pass a statute defining a crime, but a conviction of a crime is a function clearly judicial, encompassed by the final clause of Section 2, Article III, of the Constitution and could not be legislatively or administratively performed.

In conformity with this distinction this Court has constantly refused to pass upon questions involving the exercise of judgment and discretion, seemingly judicial

in their character, but in a sphere which under the Constitution is exclusively one for the legislature to perform. Thus in *Hayburn's Case*, 2 Dall. 410, and in *United States* v. *Ferreira*, 13 How. (54 U. S.) 40, this Court refused to intervene in cases where the Congress or administrative officers had the final right of determination, the judgments of the courts being merely advisory in their nature.

Similarly, where truly judicial questions arise under the laws of the United States but by virtue of the character of the parties involved or the nature of the questions to be presented, the matters are not cognizable by the constitutional courts of the United States, it is competent for the Congress to set up courts, designated legislative courts, which may dispose of those questions. A primary example of this type of jurisdiction is the Court of Claims which, as was pointed out by this Court in *Ex parte Bakelite Corp.*, 279 U. S. 438, is truly a legislative court. The United States being a sovereign has the right to refuse to be sued. If it gives its consent it can give its consent under such conditions as it may impose and it may vest the determination of any questions relative to claims against it in any body it may set up for that purpose. It may make the determinations of such court subject to subsequent administrative action as well as subsequent legislative action. If it does so, however, there is no case or controversy under the Third Article of the Constitution such as will permit this Court upon appeal to review the determination. *Gordon* v. *United States*, 2 Wall. 561 (also the opinion written by Mr. Chief Justice Taney shortly before his death and before decision of the case, which is reported at 117 U. S. 697). This distinction between the legislative court which can

be made subject to all manner of restrictions and the constitutional court upon which the Congress cannot impose the duty of passing upon matters not truly within the Third Article of the Constitution, is clearly pointed out by a comparison of the determination in *Gordon* v. *United States, supra,* and in *United States* v. *Jones,* 119 U. S. 477, where it was pointed out that this Court was vested with appellate jurisdiction of controversies arising in the Court of Claims once the Congress had made the determination reached by that Court final and no longer subject to executive or administrative action.

Similar illustrations are found in the territorial courts which exercise, under the mandate from Congress, a judicial function but not a judicial function under the Third Article of the Constitution but rather under the Third Section of Article IV which gives Congress the power to "make all needful Rules and Regulations, respecting the Territory or other property belonging to the United States".

The petitioners make no question, therefore, as to the right of the Congress to vest with judicial or quasi-judicial powers and functions bodies or courts other than those erected pursuant to Article III of the Constitution of the United States. The petitioners do contend, however, that the only type of such judicial or quasi-judicial functions which the Congress can vest in bodies other than the constitutional courts are those which, because of the character of the questions involved, the character of the parties involved or the territorial jurisdiction concerned, were such as to make the matters incapable of cognizance by the constitutional courts. Thus, if no case or controversy is involved, the Congress

is free to impose and, indeed, must impose the duty of any determination upon a legislative as distinguished from a constitutional court or body; or if a power is involved which the Congress has the exclusive right to exercise it may exercise it through any legislative as distinguished from a constitutional court or body. And likewise, the reverse of this principle must be true and, we contend, is definitely established by the authorities to which we have referred above as well as other numerous decisions of this Court, to wit, that if there be a true case or controversy and if that case or controversy involve the Constitution or the laws of the United States, and are of such type as are usually included within the general jurisdiction of a court of law or a court of equity, and if the parties to the controversy be within the classes specified in Section 2 of Article III of the Constitution of the United States, then within the principle laid down by Mr. Justice Story in *Martin* v. *Hunter, supra*, the Congress is incapable of taking such case or controversy away.

The test to be applied, therefore, within the authorities is this: *If there be a right or liability which depends upon or arises under the Constitution or the laws of the United States, and if the parties are within the classes of parties mentioned in Section 2 of Article III of the Constitution of the United States, and if such case or controversy is cognizable by courts of law or equity as legal and equitable jurisdiction existed at the time of the adoption of the Constitution of the United States, without any further legislative mandate, then the parties whose rights or liabilities are involved have a constitutional right to a judicial determination by a constitutional court.*

In the case at bar there can be no doubt but that a claim by the government against the transferee of the property of a taxpayer is of such character that the constitutional courts of equity would assume jurisdiction merely by virtue of their general character as a court of equity and without any further legislative mandate or power. Proof of this contention is established by the decision of Mr. Chief Justice Marshall in *United States v. Howland*, 4 Wheat. (17 U. S.) 108. In that case (to which reference has already and will hereafter be made), this Court had before it a discussion of the nature of a claim by the United States against the transferees of a payer of customs duties, and the Learned Chief Justice determined that the nature of this case or controversy is in the nature of a suit for an accounting which clearly is a subject matter for equitable jurisdiction quite without any further legislative mandate. Chief Justice Marshall said:

> "But the United States are creditors of Shoemaker & Travers, and have a right as creditors, to proceed against their property in the hands of Howland and Allen. They have a right to so much of that property as remains, after the debt due to Howland and Allen shall be satisfied. But to ascertain this amount, an account between Howland and Allen and the debtors to the United States should be taken, and the persons against whom the account is to be taken, should be parties to the suit."

Indeed, our contention might be demonstrated in the form of syllogism, as follows:

> THIS COURT AND THE OTHER CONSTITUTIONAL COURTS WILL NOT TAKE COGNIZANCE OF MATTERS ADMINISTRATIVE IN THEIR CHARACTER (*Keller* v.

Potomac Electric Co., 261 U. S. 428). THIS COURT AND THE OTHER CONSTITUTIONAL COURTS HAVE TAKEN COGNIZANCE OF A CLAIM BY THE UNITED STATES AGAINST THE TRANSFEREE OF A TAXPAYER (*United States* v. *Howland*, 4 WHEAT. (17 U. S.) 108). THEREFORE, A CLAIM BY THE UNITED STATES AGAINST A TAXPAYER IS NOT A SUBJECT OF ADMINISTRATIVE DETERMINATION.

Or, put otherwise:

THE CONGRESS CANNOT TAKE FROM THE COURTS OF THE UNITED STATES A MATTER WHICH IS ONE OF CONSTITUTIONAL JUDICIAL COGNIZANCE (*Martin* v. *Hunter*, 1 WHEAT. (14 U. S.) 304). A CLAIM BY THE UNITED STATES AGAINST THE TRANSFEREE OF A TAXPAYER IS A MATTER OF JUDICIAL COGNIZANCE (*United States* v. *Howland*, 4 WHEAT. (17 U. S.) 108). THEREFORE, THE CONGRESS CANNOT TAKE FROM THE CONSTITUTIONAL COURTS OF THE UNITED STATES THE POWER TO PASS UPON THE CLAIM OF THE UNITED STATES AGAINST THE TRANSFEREE OF A TAXPAYER.

Nor does it oviate these results that the determination of the Commissioner is subject to appeal. The fact is that he does under Section 280 render a final and self-executing determination. In this regard he is exercising exactly the type of jurisdiction which is required of the constitutional courts. Thus in the opinion of Mr. Chief Justice Taney in *Gordon* v. *United States*, 117 U. S. 697, 702, to which reference has already been made, in defining the judgment required of a lower court in order to be appealable to the Supreme Court of the United States, it was said:

"The inferior court, therefore, from which the appeal is taken must be a judicial tribunal au-

> thorized to render a judgment which will bind the rights of the parties litigating before it, *unless appealed from and upon which the appropriate process of execution may be issued by the court to carry it into effect.*" (Italics ours.)

In conclusion we merely cite to the Court instances in which it has been held that congressional legislation is invalid because it attempted to vest judicial power in legislative or executive officers. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *United States* v. *New River Collieries,* 262 U. S. 341; *National City Bank* v. *United States,* 275 Fed. 855, affd. 281 Fed. 754.

The Holding in Murray's Lessee v. *Hoboken Does Not Support the Constitutionality of Section 280.*

The Court below (R. 25, 26) based its determination that the principle of the separation of powers is not violated by Section 280 upon the opinion of this Court in *Murray's Lessee* v. *Hoboken Land, etc., Co.,* 18 How. (59 U. S.) 272. That case, however, seems to afford no basis for such decision. There the question was as to the constitutionality of summary process against a collector of United States revenues on account of a shortage in his accounts. This Court was at considerable pains to examine into the history of such process and sustained the process on the ground that historically those who assume the position of receivers of revenue have, in England and in this country, subjected themselves to such process. The holding of the Court is stated in the following language:

> "This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due

from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers 'the law of the land' authorize the employment of auditors and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question."

In other words the decision in the *Murray's Lessee* case was based upon the peculiar relationship of collector of revenue to his government. The Court, indeed, might well, it seems, have placed the decision on the simpler ground that the statute authorizing the summary inquisition and warrant of distress, having been in contemplation of the Government and of the revenue collector at the time when he assumed his task as revenue collector, it became a part of the contract between the parties and he, in assuming his office, agreed to have his rights as against the Government determined in this summary way. Likewise, of course, anyone contracting with the Government may agree that disputes between them may be determined by any body of arbitrators and in any manner. The agreement of the parties would then be selecting the forum. The Constitution, of course, does not limit contracting parties in this particular. It is only when the Congress, contrary to the will of an individual, compels him to yield to a determination judicial in its character, by an administrative officer, that there exists a right to complain.

Nor does it seem that the Court below was correct in its statement (R. 26) that "the Commissioner's determination of the transferee's liability, and the extent of it, is not different in kind from the auditing of the amount due from the defaulting collector in *Murray's Lessee*". The auditing of the collector's account was merely a matter of determining receipts and authorized disbursements. Here, as shown at the beginning of this Point, complicated questions of law, of fact and of equity jurisdiction may intervene. Under Point II we shall consider briefly that the summary process cannot be justified as due process of law under the case of *Murray's Lessee*. Here we believe that the demonstration has been conclusive that the case of *Murray's Lessee* does not uphold Section 280 against attack as a violation of the principle of the separation of powers.

POINT II.

Section 280 of the Revenue Act of 1926 offends against the due process clause of the Fifth Amendment.

The liability of a transferee of a taxpayer to the Government is in the nature of a debt. As Chief Justice Marshall in *United States* v. *Howland*, 4 Wheat. (17 U. S.) 108, said:

> "But the United States are creditors of Shoemaker & Travers, and have a right, as creditors, to proceed against their property in the hands of Howland and Allen."

As the debtor in such case, of course, is indebted to the sovereign, the sovereign has such remedies as are con-

sistent with the due process clause (the separation of powers not here being taken into account). The due process clause assures to persons within the United States those protections against drastic and summary action on the part of the Government which were assured to the inhabitants of England and of the colonies at the time when the Constitution was adopted. In *Hurtado* v. *California,* 110 U. S. 516, the Court said:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues * * *. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.
>
> It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they

must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."

This Court in the *Murray's Lessee* case, 18 How. (59 U. S.). 272, examined the summary methods for the collection of debts due to the Crown, which had been used by the Crown of England prior to the adoption of Magna Charta, and thereupon remarked:

> "That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: 'We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt'."

In Chitty's Prerogatives of the Crown, page 265, it is said:

> "It would be contrary to the first principles of law and justice, to issue process of execution before it is ascertained what debt is due to the Crown, and such debt becomes a debt on record. It may, therefore, be laid down, as a general rule, that till the debt, not being *per se* of record, be ascertained, and becomes a record by a commission and proceeding thereon, the Crown is not entitled to process of execution, unless in cases

> of danger, or insolvency, when an immediate extent may be issued subject to the rules which will be mentioned. The Crown has no election on this subject. It is bound strictly by this principle.
>
> With respect to the question, what is a debt of record? it seems, that at common law there is no exception in the case of a Crown debt from the general rules prevalent on this subject in common cases. There are, however, some few exceptions by statute."

In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, this Court had before it a statute of Florida which authorized a judgment-creditor of a corporation whose execution against the corporation had been returned unsatisfied to issue execution against the property of a stockholder to the extent of his unpaid subscription. This Court held such statute unconstitutional, as not affording due process of law under the Fourteenth Amendment, saying:

> "But before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."

The only answer which the Government thus far appears to have been able to make to this contention is that, as shown by the Congressional Record, it affords a more efficient and rapid method of collection in the amounts

of these liabilities. The same argument could be made with regard to the collection of all debts owing to the United States; and doubtless the sum total of such debts would amount to as handsome a figure as the total which is likely to be collected by application of the provisions of Section 280. The large tax liabilities resulting from war-time profits which may have been rendered difficult of collection by transfers is also urged. A weakening of the constitutional guarantees to meet this purely temporary condition hardly seems warranted.

What drastic provisions for imposition of summary penalties might be constitutionally justified in the case of stockholders or directors of a corporation who distribute its assets for the purpose of working a fraud upon the taxing powers of the United States is not here in question. There is no pretense that this corporation which liquidated its business, turned it all into cash and distributed it among its stockholders was actuated by any such purpose. There is no finding or suggestion of fraud. There is no requisite under Section 280 that any improper motive or purpose be intended or accomplished. The section has its universal application to all cases of transfer no matter how innocent. To innocent transferees the ordinary processes of the courts should be held open.

POINT III.

Section 280 of the Revenue Act of 1926 offends against the Seventh Amendment of the Consitution.

As we have seen, the provisions of Section 280 authorize the Commissioner to assess against a transferee his liability at law as well as his liability in equity. The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law."

Of course, the amount here in controversy exceeds $20. It also appears to be true that the liability of a stockholder of a Pennsylvania corporation who receives the property of the corporation in liquidation is a liability at law and fixed by statute. Thus it is provided in the Corporation Act of 1874, Section 39, cl. iv.:

> "If any part of the capital stock of a company is withdrawn and refunded to the stockholders before the payment of all the debts of the company contracted previously to the recording of a copy of the vote for that purpose in the office of the Recorder of Deeds, as prescribed in the preceding section, all the stockholders of the company shall be jointly and severally liable for the payment of such debts".

And in Section 15 it is in part provided as follows:

> "But no stockholder shall be personally liable for payment of any debt contracted by any such

corporation, unless suit for the collection of the same shall be brought against such stockholder or stockholders, within six months after such debt shall have become due".

There is nothing in this joint and several liability of the stockholders which requires the interposition of a court of equity, and the liability pursuant to the statute would seem to be at law inasmuch as the law affords a plain, adequate and complete remedy. As will appear from the appendices to this brief, numerous of the other states have statutory provisions imposing a legal liability upon stockholders in distribution. By the plain mandate of the Seventh Amendment such stockholders are entitled to have their liability determined by a jury. This point is noted in a learned discussion of the subject by Mr. O. John Rogge of the Chicago Bar, appearing in 27 Michigan Law Review 39, at page 64, where, in discussing the remedies against a transferee which exist independently of Section 280, he says:

> "Some of the proceedings will be in equity, as for example, in cases of fraudulent conveyances, and generally where stockholders receive the assets of a corporation which has not paid its debts including taxes, or where an attempt is made to follow the *res;* while others will be at law, as, for example, actions for injuring, destroying or passing on property subject to the lien, and actions against transferees who assume to pay the tax. In the event that the action is at law and is brought in the federal courts the transferee is entitled by the Seventh Amendment, to a jury trial if the value in controversy exceeds $20."

We believe that it is clear that the intent of Congress was to include in Section 280 all liabilities of transferees whether in law or in equity. If the section is unconstitutional as to the great body of cases where the liability is at law, it should be declared unconstitutional in its entirety as there is no evidence that the liability at equity would have been taken into the section alone if all legal liability were excluded. *Pollock* v. *Farmers Loan and Trust Co.*, 158 U. S. 601; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304; *Spraigue* v. *Thompson*, 118 U. S. 90, 95.

POINT IV.

If the assessment by the Commissioner be construed as a tax, then the assessment is unconstitutional for want of uniformity.

The liability which the Commissioner is authorized to assess pursuant to the provisions of Section 280 of the Revenue Act of 1926 has been analogized in some of the cases to a tax liability. Mr. Justice Sutherland in *United States* v. *Updike*, 281 U. S. 489, said:

> "Indeed, when used to connote the payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax."

We urge that the liability is not a tax liability but rather that which it is declared by the statute to be, an ordinary liability at law or in equity. Indeed, that

is the position which the Government took in the *Updike* case. The *Updike* case did not declare the liability was one for a tax and with the holding of the *Updike* case the petitioners in this proceeding are in entire accord. We foresee that probably the Government may here contend, however, that the liability is a tax and therefore all of the summary remedies for tax collection may be constitutionally justified. If it is a tax, it would seem to be a direct tax and not being apportioned offends against Article I, Section 2 of the Constitution. The Government will therefore probably attempt to support the statutes as imposing an income tax.

Passing over the proposition that the tax as against Mr. Phillips is not one based on his income and therefore scarcely justified by the Sixteenth Amendment, we may consider it as a tax upon Mr. Phillips, somehow calculated upon the earnings of the Coombe Garment Company, Inc. of which he was a stockholder. None the less, the tax would violate the Constitution because of its utter want of uniformity. The Constitution by Article I, Section 2, demands that direct taxes shall be apportioned among the states according to their respective numbers. Article I, Section 8, demands that duties, imposts and excises shall be uniform throughout the United States. In *Pollock* v. *Farmers Loan & Trust Company*, 158 U. S. 601, this Court held that taxes upon the income of real and personal property, being in effect taxes upon that property itself, were direct taxes and therefore were required to be apportioned among the several states in accordance with their respective numbers. The plain intimation of the Court's decision was that taxes upon incomes derived from business, occupations and professions were excises and

therefore were required to be uniform throughout the United States. With the adoption of the Sixteenth Amendment there might have been some doubt that taxes upon the income derived from real and personal property were required to be uniform throughout the United States, but no one of course, could doubt, in view of the holding in the *Pollock* case, that income derived from such businesses as that of the Coombe Garment Company, Inc., would be in the nature of an excise and would be required to be uniform throughout the United States.

The question came before this Court in *Brushaber* v. *Union Pacific Railroad,* 240 U. S. 1, 18, 19, and it was there held that the effect of the Sixteenth Amendment was to eliminate all distinctions among incomes, depending upon the sources from which they were derived and that the taxes upon all incomes were to be treated as excises and therefore required to be uniform throughout the United States pursuant to the provisions of Article I, Section 8 of the Constitution.

It should therefore follow that if the assessment made against Mr. Phillips is to be treated in some manner as an income tax, then that assessment must be of such nature that it would be uniform throughout the United States. If it can be demonstrated that there is lack of geographical uniformity among such assessments, then they would offend against the provisions of Article I, Section 8 of the Constitution of the United States. We also refer to *Bowers* v. *Kerbaugh,* 271 U. S. 170, 173, 174; *Bromley* v. *McCaughn,* 280 U. S. 124, 135, 138; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 112, 113; *Peck* v. *Lowe,* 247 U. S. 165, 172.

It is recognized that the liability of transferee stockholders of a corporation depends as a matter of the conflict of laws upon the law of the state of incorporation with certain exceptions hereafter to be noted. Thus this Court in *Glenn* v. *Liggett*, 135 U. S. 533, in speaking of a stockholder's liability, said:

> "The rights of the parties in the present case must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to the stock were made."

In *Bernheimer* v. *Converse*, 206 U. S. 516, this Court said, at page 533:

> "By becoming a member of a Minnesota corporation and assuming the liability attaching to such membership, he became subject to such regulations as the state might make to lawfully render the liability effectual."

The Court is also referred to *Converse* v. *Hamilton*, 224 U. S. 243; *Flash* v. *Conn*, 109 U. S. 371.

To determine, then, what is the liability in law or in equity of transferee stockholders of a corporation, it becomes necessary to examine the statute and common law of the forty-eight states. As we shall presently see, there is the utmost lack of uniformity in the laws of the several states with regard to this liability. We shall also consider briefly the divergence among the states as to the liability of a stockholder who merely receives dividends from a corporation which impair its capital at the time when the corporation is, nevertheless, solvent. We shall not consider or discuss the possible

divergence in the views of the several states as to the liability of innumerable other types of transferees in the belief that if in these two classes the liability is not uniform, Section 280 cannot be sustained as imposing a tax upon income.

We have attached to this brief as appendices a review of the statutory provisions of many of the states which prescribe the liabilities of stockholders of corporations organized thereunder. These statutory provisions have been gathered from the 1931 edition of the Corporation Manual. We believe that a mere reference to this data is convincing without more, that the assessment of the statutory liability of a transferee stockholder is the assessment of a liability which is lacking in uniformity to the most extreme degree. We here will refer merely to the striking contrast between the liability of such transferee stockholders under the laws of Michigan, Louisiana and Connecticut.

In Michigan the statutory provision is as follows:

> "If the capital stock of any corporation shall be withdrawn, and refunded to the stockholders before the payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be jointly and severally liable to any creditor of such corporation, in an action founded on this statute, to the amount of the sum refunded to him or them respectively" (Public Acts 1921, Act 84, Part 2, C. 3, Section 1). 1931 Corporation Manual, 638.

In Louisiana the provision is as follows:

> "If any dividend shall be paid in violation

of Section 24, or if any other unlawful distribution, payment or return of assets be made to shareholders: I. The directors who knowingly, or without exercising that diligence, care and skill which ordinarily prudent men in like positions would exercise under similar conditions, voted in favor thereof, shall be liable jointly and severally to creditors of the corporation in an amount equal to the amount of the dividends so paid and the distribution, payment or return of assets so made. II. Every shareholder who receives any such dividend or any such distribution, payment or return of assets shall in the following instances be individually liable to the corporation in an amount equal to the amount so received by him:" (thereafter follow conditions precedent to the maintenance of an action against the stockholder) (Laws of 1928, Act 250, Section 27). 1931 Corporation Manual, 502, 503.

In Connecticut the provision is as follows:

"In case any distribution or other disposition of the assets of the corporation involved in or resulting from such reduction shall render the corporation insolvent, the stockholders voting in favor thereof shall be jointly and severally liable, to the amount so distributed or disposed of, for all debts of the corporation existing at the time of such vote, after judgment had been obtained against such corporation and execution has been returned unsatisfied" (G. S., Section 3420). 1931 Corporation Manual, 176.

So also is there utter lack of uniformity with respect to the liability of stockholders who receive dividends from the corporation which impair its capital but which

none the less do not render the corporation insolvent. In one group of states (and this is also the Federal rule) it is held that such dividends do not render the stockholder liable to the creditors of the corporation as the trust fund theory does not begin to apply until the corporation has become insolvent. *McDonald* v. *Williams*, 174 U. S. 397; *Carlisle* v. *Ottley*, 143 Ga. 797. Other states hold that the stockholder receiving such dividend is liable irrespective of insolvency. *Mackall* v. *Pocock*, 136 Minn. 8. A compendium of the cases illustrative of this divergence appears in a note in L. R. A., 1917 C. 397.

Enough has, we believe, been shown to demonstrate the utter inequality among the several states of the liability in law or in equity of transferee stockholders of corporations. Such want of uniformity renders any justification of Section 280 of the Revenue Act of 1926 as a taxing statute impossible.

POINT V.

Section 280 of the Revenue Act of 1926 is unconstitutional as a delegation by the Congress of the taxing power to the Legislatures of the several states.

Under this point we shall again assume that an effort will be made to justify Section 280 as a taxing statute. Under the authorities cited in Point IV, it is obvious that the liability in law or in equity of a transferee stockholder of a corporation depends upon the law of the state of incorporation. If the Congress by Section 280 intended to authorize the Commissioner to assess as a tax the amount of the liability of a stockholder trans-

feree, it thereby authorized him to assess such liability as might be from time to time fixed by the statutes of the forty-eight states. Such statutes are subject to repeated amendments by the respective legislatures and the liability of the stockholder would, under most state constitutions, depend upon the statutes in force at the time when the respective transfers took place. *cf. Bernheimer* v. *Converse*, 206 U. S. 516.

The taxing power is a legislative power. Constitution of the United States, Article I, Section 8. It is unconstitutional for any legislative body to delegate its legislative functions to the legislature of another jurisdiction. Although our research has disclosed no case in this Court upon the subject, the Courts of several states have declared this to be an axiomatic proposition of constitutional law. In *Moore* v. *Allen & Grant*, 30 Ky. 651, the Court of Appeals of Kentucky said:

> "The legislative authority of Congress cannot be delegated to the legislatures of the states. The power confided to members of Congress is a personal trust, which cannot be transferred by them. When called on to account to their constituents for their conduct, it would be at war with our whole system to excuse them upon the ground that they had delegated their powers to the legislature of a state."

In the *Opinion of the Justices*, 239 Mass. 606, the Supreme Judicial Court of Massachusetts had before it a statute of that State which defined intoxicating liquors by reference to definitions which might thereafter be adopted in national legislation. The Court held that

this reference amounted to an unconstitutional delegation of legislative powers, saying:

> "We are of opinion that legislation of that nature would be contrary to the constitution of this commonwealth. Legislative power is vested exclusively in the general Court except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government to republican institutions for the representatives of the people to abdicate their exclusive privileges and obligation to enact laws * * * As already has been stated, no statute would be valid whereby it should be attempted to make operative as a statute of this commonwealth such test, standard, difference or rule to be enacted or adopted in the future."

We also refer the Court to *State* v. *Vino Medical Co.*, 121 Me. 138.

POINT VI.

In no event should the assessment here exceed Mr. Phillips' *pro rata* share of the liability.

If it be sought to avoid the effect of the rule respecting conflict of laws, to which reference has been made in the preceding points, on the theory that the United States has a general equitable right upon trust doctrines to follow the assets of a corporation irrespective of state

statutes, and if it be determined that the doctrines of separation of powers and due process of law do not here preclude the assessment of a liability, then the liability should not exceed such an amount of the tax of the corporation as the stock held by the transferee bears to the entire stock of the corporation. This assertion we base upon two grounds. First, that the equity rules of the United States require the bringing in of all necessary and proper parties and in so doing it has been held that only a proportionate liability should be assessed; where only part of the stockholders have been brought in and no proper reason assigned for omitting the others; and, secondly, upon the ground that upon the facts found by the Commission of Internal Revenue no more than a proportionate liability can be assessed upon this particular taxpayer.

The findings of the Board of Tax Appeals (R. 16) show that the Commissioner did not even send to any of the other stockholders a notice that they would be held liable for the tax upon the company. No effort was made to fasten liability on anyone other than Mr. Phillips. No excuse was given nor found for failure to bring in the other stockholders. In a suit in equity to enforce this liability, there can be no doubt that the other stockholders would have been proper parties and that under Equity Rules 37 and 39 they would have been brought in unless it were shown that to attempt to bring them in would be futile or would oust the Court of jurisdiction. In the absence of the other stockholders and in the absence of excuse, no more than a pro rata recovery, it seems, would have been justified. *United States* v. *Armstrong*, 28 Fed. (2d) 227; *United States* v. *Snook*, 24 Fed.

(2d) 844; *Updike* v. *United States*, 8 Fed. (2d) 913. In the case last cited it was held:

> "All stockholders must be made parties defendant."

In *Wood* v. *Dummer*, Fed. Case 17944, Mr. Justice Story inclined toward the view that if less than all of the stockholders were brought in as proper parties without excuse for failure to bring in the others, only a proportionate liability could be assessed against those who were made defendants. The equity rules of the United States are not varied by any requirement of conformity to state procedure, but on the other hand are uniform, and if proportionate liability is the rule of the equity courts in one jurisdiction, it must be the rule throughout the United States.

Mr. Justice Marshall, in *United States* v. *Howland*, 4 Wheat. (17 U. S.) 108, said:

> "* * * As the courts of the United States have a chancery jurisdiction in every state, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states."

The same rule has been laid down in *Boyle* v. *Zacharie*, 6 Pet. (31 U. S.) 648; *Neves* v. *Scott*, 13 How. (54 U. S.) 267; *Noonan* v. *Lee*, 2 Black (67 U. S.) 499.

Furthermore, under the findings made by the Board of Tax Appeals, no more than a proportionate liability can in any case be assessed against Mr. Phillips. As stated at the outset of this brief, there is no finding as to

the amounts of the various distributions made to the stockholders of the Coombe Garment Company, but it is merely found that $68,558.35 was distributed between July 25th, 1919, and September 27th, 1919 (R. 15).. It is also found that the capital stock of the company was $50,000 (R. 14-15). We may, therefore, set up the balance sheet of the Coombe Garment Company as of July 25th, 1919, as follows:

Assets		Liabilities	
Cash and other property	$68,558.35	Tax	$ 9,306.36
		Capital stock	50,000.00
		Surplus	9,251.99
	$68,558.35		$68,558.35

When the first $9,251.99 was distributed among the stockholders of the Coombe Garment Company, it was a dividend entirely out of surplus and no possible liability could have been entailed. It is also true, under the rule laid down by this Court in *McDonald* v. *Williams*, 174 U. S. 397, that when the next $50,000 was distributed among the stockholders of the corporation, no liability accrued as against Mr. Phillips, for the company was still solvent. It was only when the last $9,306.36 was distributed that any liability in law or in equity arose as against Mr. Phillips. His liability would not exceed the amount which he received upon such distribution and since he was a 25% stockholder his liability would not be in excess of 25% of the last distribution, or $2,326.59.

By Section 602 of the Revenue Act of 1928, it was provided:

> "In proceedings before the Board the burden of proof shall be upon the Commissioner to show

> that a petitioner is liable as a transferee of property of a taxpayer but not to show that the taxpayer was liable for the tax."

The absence of any finding as to the dates when the various distributions were made indicates that the Commissioner did not bear the burden of proving at what time the Coombe Garment Company became insolvent and therefore which of the transfers imposed a liability upon the transferees. This proof of the time when insolvency occurred is recognized as difficult but necessary. Thus this Court said in *McDonald* v. *Williams*, 174 U. S. 397:

> "The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.
>
> * * * * * * *
>
> Although no trust exists while a corporation is solvent, the fact which creates the trust is the insolvency and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved."

It follows that upon the facts found, there cannot be any liability upon any theory on the part of Mr. Phillips beyond his proportionate amount of the liability.

POINT VII.

The assessment was barred by the Pennsylvania Statute of Limitations.

The Pennsylvania statute regulating the liability of stockholders who receive the property of a corporation provides as follows:

> "But no stockholder shall be personally liable for payment of any debt contracted by any such corporation, unless suit for the collection of the same shall be brought against such stockholder or stockholders within six months after such debt shall have become due" (Act of 1874, Section 15). 1931 Corporation Manual, page 1231.

As we have seen under another point, the liability of a stockholder is governed by the law of the state of incorporation of the company. It is the well recognized law that a statutory liability which has appended to it a statutory period of limitations is conditioned by that period of limitations and that with the expiration of the period of limitations the liability itself is extinguished. *Davis* v. *Mills*, 194 U. S. 451; *The Harrisburg*, 119 U. S. 199; *Phillips* v. *Grand Trunk Western Railway*, 236 U. S. 662.

POINT VIII.

The petitioners have done nothing to waive their rights to question the constitutionality of Section 280 of the Revenue Act of 1926.

In the Circuit Court of Appeals the Government contended that the petitioners here, by appealing from the ruling of the Commissioner to the Board of Tax Appeals, had waived their right to question the constitutionality of Section 280. The argument was that one provision of Section 280 gave the right to appeal to the Board of Tax Appeals and therefore, by availing themselves of that right they had lost all right to question the constitutionality of any other provision of Section 280, including the provision which provided for the assessment of the liability itself.

We believe that no such proposition can be supported. There is no doubt that there is a rule with regard to the waiver of constitutionality of a statute where the party attacking its constitutionality has sought the benefit of the very portion of the statute attacked. The authorities relied upon by the Government are of that type.

In the case of *Great Falls* v. *Attorney-General,* 124 U. S. 581, the plaintiff commenced the action to restrain the Attorney-General from occupying the plaintiff's property taken pursuant to a condemnation statute passed by Congress. Prior to the commencement of that action the plaintiff filed a bill in the Court of Claims pursuant to the condemnation act to recover the value of his land taken in the condemnation proceedings. In the present action the plaintiff claimed

that the condemnation act was unconstitutional for the reason that the act provided that the Court of Claims should award damages to the plaintiff and did not contain a provision for an award of damages by a common law jury. The Court held that the plaintiff was estopped from raising the constitutional question because the plaintiff had waived his right to bring an action in tort by bringing the prior action on a contract implied in law. In other words, the claimant had availed himself in the Court of Claims of the very remedy which he thereafter sought to attack as unconstitutional. Viewed in another way, in the Court of Claims he had treated the title to the property as vested in the Government whereas in the latter proceeding he had sought to take an inconsistent position that the title was still in himself and that the Government should be ousted.

Similarly, in *Wall* v. *Parrott*, 244 U. S. 407, it was held that a stockholder who had availed himself of a statutory action to have his stock assessed in connection with a merger of two corporations could not thereafter attack the statute on the ground that the provision for assessment which he himself had invoked was unconstitutional.

So also, in *Booth Fisheries* v. *Industrial Commission*, 271 U. S. 208, it was held that where an employer had a right either to elect to be governed by workmen's compensation law or by common law liability, and he elected to be governed by the workmen's compensation law and invoked the remedies provided for by the law for the testing of his liability, he could not thereafter, being disappointed in the remedy given, attack the constitutionality of that remedy.

A mere summary of the holding in the foregoing cases clearly distinguishes them from the situation here present. It is true that petitioners appealed to the Board of Tax Appeals. But in so appealing they attacked the validity of the statute only in so far as it gave to the Commissioner the right to assess. No contention is made by the petitioners before this Court that the remedy for testing the constitutionality of the statute provided by the appeal to the Board of Tax Appeals was inadequate or unconstitutional. The remedy and the original liability are as quite separate and distinct as if they had been provided in two separate statutes. This point was recognized by the Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroller*, 36 Fed. (2d) 208, where the Court said:

> "To say that an act may impose an unconstitutional liability and forbid all judicial review except in one way, and then that one who appeals for review in the way provided for him thereby estops himself to deny the validity of the imposition, is, to our minds, an obvious solecism."

This Court has ruled that to involve such waiver, the party attacking the constitutionality of a statute, must have claimed property under or received a benefit from the very provision later attacked. *Frost* v. *Corporation Commission*, 278 U. S. 515; *Buck* v. *Kuykendall*, 267 U. S. 307; *Arizona* v. *Copper Queen Mining Co.*, 233 U. S. 87.

Moreover, the petitioners believe that it is not necessary for them to rely upon the provisions of Section 280 in order to justify their appeal to the Board of Tax Appeals. This Court in *United States* v. *Updike*, 281

U. S. 489, recognized that the transferee, for remedial purposes, is entitled to be placed in the position of a taxpayer. Likewise, the Court below recognized that although the statute does not expressly give the transferee a right to appeal from the Board of Tax Appeals to the Circuit Court of Appeals, none the less such right to appeal does lie by reason of the fact that the transferee is entitled, for remedial purposes, to be classed as a taxpayer. This being true, the petitioners would have been within their rights to appeal to the Board of Tax Appeals from the assessment made by the Commissioner even had Section 280 made no provision relative thereto.

Therefore, there is no waiver.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed and the assessment against the petitioners' testator should be ordered vacated.

Respectfully submitted,

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Appendix No. 1.

STATE LAWS AFFECTING LIABILITY OF TRANSFEREE STOCKHOLDERS

STATE	PROVISION	STATUTE
CALIFORNIA	Pro rata liability irrespective of amount received.	Article 12, Section 3.
CONNECTICUT	Each stockholder voting for dissolution liable up to the aggregate amount distributed to all stockholders.	G. S. 3420.
DELAWARE	Each stockholder liable to creditors up to amount received in dissolution provided statutory notice was not published.	L. 1929, Chapter 135, Section 14.
IDAHO	Directors knowingly distributing prior to payment of debts are liable to creditors for full amount distributed. Stockholders' liability up to amount received arises only when no directors liable. Stockholders' liability is to corporation and not to creditors.	B. C. A., Section 21.
LOUISIANA	Directors knowingly distributing prior to payment of debts, are liable to creditors for full amount distributed. Stockholders' liability up to amount received, arises only when no directors are liable.	L. 1928, Act 250, Section 27.
MASSACHUSETTS	Joint and several liability up to amount received by respective stockholders.	G. L. Chapter 156, Section 35.
MICHIGAN	Joint and several liability up to amount received by respective stockholders. An action against stockholder must be founded on the Statute.	P. A. 1921, Act 84, P. 11, c. 3, Section 1
MINNESOTA	Joint and several liability up to amount received by respective stockholders.	Constitution, Article 10, Section 3, G. S. 7776.
MISSOURI	Full liability irrespective of amount received, with right of recovery over.	R. S. 9776.
NEVADA	Each stockholder liable to creditors up to amount received in dissolution provided statutory notice was not published.	R. L., Section 1144.
NEW JERSEY	Each stockholder liable to creditors up to amount received in dissolution provided statutory notice was not published.	C. S., Section 29.
NEW MEXICO	Stockholders jointly and severally liable up to amount received by them respectively only if statutory notice not published.	Statutes 32-134.

State	Provision	Statute
North Carolina	Full liability for taxes, costs and fees in dissolution.	Con. St. 1183.
Pennsylvania	Joint and several liability for all debts.	Act 1874, Sec. 39, Clause IV.
Vermont	Joint and several liability up to amount received by respective stockholders.	General Laws, Section 4940.
Virginia	Joint and several liability up to amount received by respective stockholders.	Code 3840.
West Virginia	Joint and several liability up to amount received, but liability is to corporation only and not to creditors.	Code, Chapter 31, Article 1, Section 14.
Wisconsin	If stockholder voted for distribution, then liable for the full amount of all debts; if stockholder did not vote for distribution, then jointly and severally liable for debts up to amount received by him.	Statutes, Sec. 182.08.

Appendix No. 2.

PROVISIONS FOR TIME LIMITATIONS

State	Statute	Period of Corporate Existence after Dissolution for Winding Up	Period of Limitations of Stockholders' Liability
Arkansas	Laws 1927, Act 250, Sec. 35	3 years	
Alabama	Code, Sec. 7069	5 years	
Connecticut	G. S., Sec. 3473		4 months for filing claims
Delaware	G. C. L., Sec. 40	3 years	
Florida	C. L. 1925, Sec. 45	3 years	
Idaho	B. C. A., Sec. 21		2 years
Indiana	G. C. A., Sections 42, 44	2 years	2 years
Louisiana	L. 1928, Act. 250, Sec. 27		2 years
Maine	R. S. Ch. 56, Sec. 82	3 years	1 year after transfer of stock
Massachusetts	G. L., Ch. 155, Sec. 51	3 years 60 days	
Mississippi	Code, Sec. 4171	3 years	
Michigan	Const. Art. XII, Sec. 3	3 years	
Minnesota	Const. Art. X, Sec. 3, G. S., Sec. 8023		18 months after dissolution
Montana	L. 1929, C. 117, Sec. 3	3 years	
Nevada	G. C. L., Sec. 65	3 years	
New Hampshire	P. L. Ch. 225, Sec. 76	3 years	
New York	S. C. L., Sec. 73		2 years
North Carolina	St. Sec. 1193	3 years	
Oregon	O. L., Sec. 6875	5 years	
Pennsylvania	Acts 1874, Sec. 15		6 months
Rhode Island	G. L. 1923, Ch. 248, Sec. 63	3 years	
South Carolina	Civil Code 1922, Sec. 4279 Act 166	2 years	
South Dakota	R. C., Sec. 8825		Creditors barred by decree of dissolution
Tennessee	C. C., Sec. 2071	5 years	
Texas	R. S., Art. 1389	3 years	
Vermont	G. L., Sec. 4956	3 years	
Virginia	Code, Sec. 3840 (unless receiver appointed)	3 years	

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No. 455

In the Supreme Court of the United States

OCTOBER TERM, 1930

ANNIE G. PHILLIPS ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose this petition.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23–27) is reported in 15 B. T. A. 1218. The opinion of the Circuit Court of Appeals (R. 40–45) is reported in 42 F. (2d) 177.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 16, 1930. (R. 46.) Petition for a writ of certiorari was filed September 13, 1930.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether Section 280 of the Revenue Act of 1926 is constitutional.

(2) Assuming that Section 280 is constitutional, whether the transferee of the assets of a dissolved corporation is liable for the unpaid taxes of the corporation to the extent of the amount which he received upon liquidation or only for a pro rata share thereof.

STATUTE INVOLVED

Section 280 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61 (U. S. C. App., Title 26, Sec. 1069), provides, in part, as follows:

> SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):
>
> (1) The liability, at law or in equity, of a transferee of property of a taxpayer, in re-

spect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

* * * * * *

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

STATEMENT

In September, 1919, the Coombe Garment Company, a Pennsylvania corporation, was dissolved and all its property was distributed among its eleven stockholders in proportion to their respective holdings. Prior thereto the corporation had filed its income and profits tax returns and paid the taxes therein indicated for the years 1918 and 1919. Subsequently a deficiency tax for each of these years was assessed against the corporation, and on June 16, 1926, the Commissioner notified I. L. Phillips, one of the stockholders, that he proposed to assess against him, as a transferee of part of the assets of the Coombe Garment Company, the entire amount of the deficiency taxes, pursuant to Section 280 of the Revenue Act of 1926. Phillips had received as liquidating dividends more than the amount of the deficiency taxes. No proceeding was initiated by the Commissioner to assess or col-

lect the deficiency taxes from any other stockholder of the dissolved corporation. (R. 24–26.)

The executors of the estate of I. L. Phillips, deceased, petitioned the Board of Tax Appeals for a redetermination (R. 4), and the Board confirmed the Commissioner's action (R. 27). Thereupon the executors filed a petition for review with the Circuit Court of Appeals for the Second Circuit (R. 29) which court affirmed the order of the Board of Tax Appeals (R. 46).

DISCUSSION

The only other Circuit Court of Appeals which has passed upon the constitutionality of Section 280 of the Revenue Act of 1926 (p. 2, *supra*) upheld it. *Rontzahn* v. *Tyroler*, 36 F. (2d) 208 (C. C. A. 6th). Two District Courts have held that it violated Section 1 of Article III of the Constitution and the Fifth Amendment. *Owensboro Ditcher and Grader Co.* v. *Lucas*, 18 F. (2d) 796 (W. D. Ky.); *Mid-Continent Petroleum Corp.* v. *Alexander*, 35 F. (2d) 43 (W. D. Okla.). See also *Felland* v. *Wilkinson*, 33 F. (2d) 961, 962 (W. D. Wis.).

On the question of the extent of the liability of a transferee of the assets of a dissolved corporation, the decision in the instant case appears to be in conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Armstrong*, 26 F. (2d) 227.

Both questions are important and are present in many pending cases. Consequently we do not oppose the instant petition.

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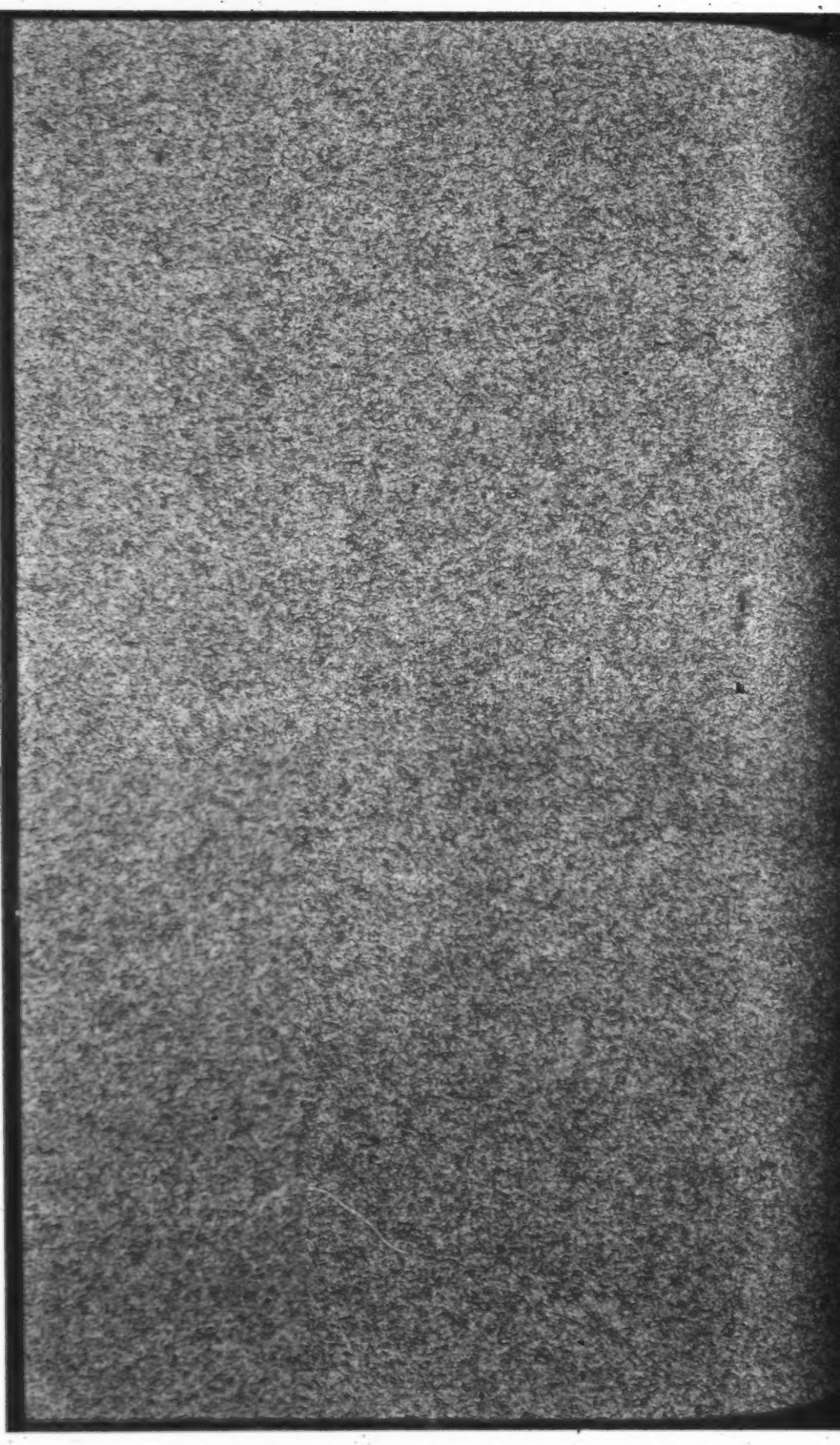

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No. 455

In the Supreme Court of the United States

OCTOBER TERM, 1930

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, AND ABRAHAM S. PHILLIPS, EXECUTORS OF THE ESTATE OF I. L. PHILLIPS, DECEASED, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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Miscellaneous:

29 Columbia Law Review, 1929, "The Constitutionality of the Transferee Provisions of the Revenue Acts," H. C. Havighurst	38
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Pomeroy's Equity Jurisprudence, Secs. 907–908	15
12 Yale Law Journal 63	15

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 455

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. PHILLIPS, deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 16–17) is reported in 15 B. T. A. 1218. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 23–29) is reported in 42 F. (2d) 177.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 16, 1930. (R. 28.) Petition for

certiorari was filed September 13, 1930. Certiorari was granted October 20, 1930. (R. 29.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 280 of the Revenue Act of 1926 is in conflict with the Constitution.

2. If Section 280 is valid, whether a stockholder receiving assets of a dissolved corporation in excess of the unpaid taxes of that corporation is liable for the payment of the total amount of such taxes.

STATUTES INVOLVED

The pertinent statutes involved will be found in the Appendices to this brief.

STATEMENT OF FACTS

The Coombe Garment Company, a Pennsylvania corporation, was dissolved during 1919, and its total assets in the sum of $68,558.35 were distributed to its stockholders in amounts proportionate to their stock ownership. (R. 14-15.)

The petitioners are the executors of the estate of I. L. Phillips, deceased, a resident of New York, who was a stockholder of the Coombe Garment Company at the time of its dissolution and received a distribution of $17,139.61. (R. 14-15.)

Subsequent to liquidation the respondent determined that additional income and profits taxes

were due from the corporation for the years 1918 and 1919, in the amounts of $277.75 and $9,124.68, respectively. The assessment of the 1918 tax was made in February, 1925, a waiver having been filed for that year, and the assessment of the 1919 tax in December, 1924. No payment has been made except a payment of $96.07 on the assessment for 1918. (R. 15, 16.)

On June 16, 1926, the respondent notified I. L. Phillips that in accordance with the provisions of Section 280 of the Revenue Act of 1926 he proposed to assess against him and collect from him the total amount of the deficiencies in the taxes of the corporation. In this communication the respondent advised Phillips that he was allowed a period of sixty days within which to file a petition with the Board of Tax Appeals for a redetermination of the deficiencies. (R. 8–9, 15–16.)

No corresponding notice of the deficiencies was sent to any of the other transferees of the corporate assets and no suit or proceeding for collection other than the present proceeding has been instituted. (R. 16.)

Petitioners, as executors of the estate of I. L. Phillips, deceased, filed a petition for redetermination within the sixty-day period. A hearing was had and thereafter the Board rendered an opinion, in which it declined to pass upon the constitutionality of Section 280 on the ground that the transferee having invoked its jurisdiction under that sec-

tion could not raise the question of its constitutionality, but held that the transferee was liable for the unpaid tax of the corporation to the extent of the amount received upon liquidation. (R. 1, 3-9, 16-17.)

Upon appeal to the Circuit Court of Appeals for the Second Circuit, that court affirmed the Board's decision in holding Phillips liable for the full amount of the tax, upheld the constitutionality of Section 280 and did not pass upon the respondent's contention that the petitioners were estopped to deny the constitutionality of that section. (R. 23-28.) The petitioners now seek a review by this Court.

SUMMARY OF ARGUMENT

It is well settled that the method regularly employed in collecting the Federal internal revenue by enforcing the collection of the tax first and permitting an appeal to the courts after payment constitutes due process. The use of summary process has not been restricted to the collection of taxes *qua* taxes but has also been applied to proceedings which are incidental or necessary to the taxing powers. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272.

Section 280 does not create a new liability but establishes a proceeding for enforcing the existing liability at law or in equity of the transferee, a liability which in the past has been enforced by suits

in equity. The procedure under Section 280 is identical in all material respects with that provided in the case of taxpayers including the right of an appeal to the Board of Tax Appeals and the alternative right of paying the tax first and later securing a judicial determination. Section 280 was enacted for the purpose of providing a more speedy and effective means of collecting the revenues of the Government. In *United States* v. *Updike*, 281 U. S. 489, it was recognized that a proceeding to enforce the liability of transferees is a proceeding to collect a tax. Hence the summary procedure provided under Section 280 does not constitute a violation of the due-process clause but is justified as a necessary adjunct to the taxing power.

The amount collected under Section 280 is an income tax and under the Sixteenth Amendment no consideration need be given to whether it meets the constitutional requirement that income taxes be apportioned according to population. No lack of uniformity in a constitutional sense will result from differences in State statutes which affect the liability of transferees.

Even if it should be held that Section 280 is not a revenue measure, the provision is nevertheless constitutional. It does not violate the due process clause, not only because the transferee has the alternative of paying the tax and suing to recover but also because the review of the Board's determi-

nation by the Circuit Court of Appeals gives him a judicial determination of his liability. It is immaterial that the determination of liability is in the first instance made by the Commissioner and the Board. This Court has in other instances sustained the power of Congress to place similar authority in administrative officers and boards. All that due process of law requires is that the individual shall have such notice and opportunity to defend as is commensurate with the character of the rights affected. *Hurwitz* v. *North*, 271 U. S. 40. The procedure under Section 280 complies with these requirements.

Nor is Section 280 unconstitutional on the ground that it improperly delegates judicial power to an administrative officer or body. The Commissioner's determination is in no sense judicial and that of the Board is only *quasi-judicial*. It is well settled that quasi-judicial powers may be vested in an executive body when this is necessary to the proper performance of the executive functions of the Government. For these reasons the power given to the Board to determine the liability of transferees does not violate the constitutional principle of separation of powers.

The liability of a transferee stockholder for the payment of the taxes of a dissolved corporation is not joint but is several to the extent of the assets received.

ARGUMENT

I

THE SUMMARY PROCEDURE PROVIDED BY SECTION 280 IS JUSTIFIED UNDER THE CONSTITUTION AS A NECESSARY ADJUNCT TO THE COLLECTION OF THE REVENUES OF THE GOVERNMENT AND AS A REVENUE MEASURE IT IS OTHERWISE UNOBJECTIONABLE

The right of the United States to collect its internal revenue by summary proceedings has been many times affirmed by this Court. *Cheatham* v. *United States*, 92 U. S. 85; *Nichols* v. *United States*, 7 Wall. 122; *Springer* v. *United States*, 102 U. S. 586; *Dodge* v. *Osborn*, 240 U. S. 118; *Graham* v. *du Pont*, 262 U. S. 234.

That the ordinary method employed in collecting internal revenue by enforcing the collection of the tax first and permitting an appeal to the courts after payment constitutes due process, is clearly stated in the case of *Springer* v. *United States*, *supra*, where the Court said (pp. 593–594):

> The proceedings of the collector were not in conflict with the amendment to the Constitution which declares that "no person shall be deprived of life, liberty, or property without due process of law." The power to distrain personal property for the payment of taxes is almost as old as the common law. Cooley, Taxation, 302. The Constitution gives to Congress the power "to lay and collect taxes, duties, imposts, and excises." Except as to exports, no limit to the exercise

of the power is prescribed. In *McCulloch* v. *Maryland* (4 Wheat. 316), Mr. Chief Justice Marshall said, "The power to tax involves the power to destroy." Why is it not competent for Congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the further legitimate exercise of the same power for the same purpose. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (18 How. 274), this court held that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid; that the warrant was conclusive evidence of the facts recited in it, and that the proceeding was "due process of law" in that case. See also *De Treville* v. *Smalls*, 98 U. S. 517; *Sherry* v. *McKinley*, 99 id. 496; *Miller* v. *United States*, 11 Wall. 268; *Tyler* v. *Defrees*, id. 331.

The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.

While in general the two principal requirements of due process, namely, notice and the right to de-

fend, are required in reference to taxation as in other matters, they are not so strictly applied. In *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, this Court said (pp. 708–709):

> Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson* v. *New Orleans:* "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The petitioners do not deny that if in this case the Coombe Garment Company had continued in existence and the Government had employed precisely the same procedure to collect the tax from the corporation as it has followed in enforcing the liability of the transferee of the company for the tax (see *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716), such procedure would have constituted due process of law. There can be no possible doubt on that issue. Under the decisions just cited, prior to the creation of the Board of Tax Appeals the Government could, without violating the due process clause, have forced collection of the taxes by distraint and left the corporation to secure a judicial determination of its liability afterwards. Hence, the privilege of an additional administrative review by the Board before payment (see *Old Colony Trust Co.* v. *Commissioner, supra*) could not have been the subject of complaint.[1]

Nor, as the court below pointed out, has the use of summary procedure been restricted to the collection of taxes *qua* taxes. It has also been applied to proceedings which are incidental or necessary to the taxing powers. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, there was

[1] It is of interest that summary process in the collection of Government revenues has existed at least since the time of the Civil War. See Act of July 13, 1866, 14 Stat. 98, 107. Sections 3186 to 3205 of the Revised Statutes reenacting such legislation became effective in 1873 and as amended appear in all of the recent Federal revenue laws. See U. S. C., Title 26, Sections 115–134.

involved the validity of an Act which provided for distraint upon the property, the person, and the sureties of any revenue collector who failed to make a proper accounting to the Treasurer of the United States. The party distrained against was required to pay first and litigate later. In holding that said Act did not constitute a violation of the due process clause, this Court said (pp. 276, 281):

> The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government and can not be so construed as to leave congress free to make any process "due process of law" by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues.

* * * * *

Among the legislative powers of congress are the powers "to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and welfare of the United States, to raise and support armies; to provide and maintain a navy, and to make all laws which may be necessary and proper for carrying into execution those powers." * * *

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution.

If, therefore, Section 280 may be regarded as a necessary and proper means for effecting the collection of the revenue of the Government and the procedure which it provides is identical in all material respects with that provided in the case of the original taxpayer, it must be concluded that it affords due process of law.

That the purpose of Congress was to establish a more speedy and effective means of collecting its

revenues is beyond question. See Statement of House Conferees, H. R. 356, 69th Cong., 1st Sess., pp. 42–45. That such was the purpose of the provision and that it has proved to be highly effective in accomplishing this purpose were also pointed out by the House Ways and Means Committee in considering the retention of the provision in the Revenue Act of 1928, H. R. 2, 70th Cong., 1st Sess., pp. 31–32, as follows:

> Section 280 of the 1926 Act has proved a very effective and necessary method of stopping tax evasion through the various favorite methods recognized by everyone prior to the 1926 Act. The enforcement of the liability through court process had been ineffective, and the amount of revenue lost through mala fide transfers or through corporate distributions of assets was admittedly large. In fact, but slightly more than $120,000 was collected through court procedure during the entire period prior to the 1926 Act. Since the procedure under section 280 has been in effect more than $1,000,000 has been collected in uncontested cases, and many times this amount is involved in cases not yet disposed of. There is no doubt that to the effectiveness of section 280 can properly be attributed the increasing demands for prompt assessment received from corporations contemplating dissolution. And many other evidences of its effect are available.

Prior to the enactment of Section 280 the Government had the right to collect its taxes by proceeding against the transferees but the proceeding lacked the expedition which is necessary in the collection of revenue for the support of the government. The right of the Government to collect income and profits taxes due from a dissolved corporation by a suit in equity against the stockholders who have received its assets upon dissolution had been many times sustained by the Federal courts. *Updike* v. *United States* (C. C. A. 8th), 8 F. (2d) 913, certiorari denied, 271 U. S. 661; *United States* v. *Armstrong* (C. C. A. 8th), 26 F. (2d) 227; *United States* v. *Kemp* (C. C. A. 5th), 12 F. (2d) 7; *Capps Mfg. Co.* v. *United States* (C. C. A. 5th), 15 F. (2d) 528; *Pann* v. *United States* (C. C. A. 9th), 44 F. (2d) 321; *United States* v. *Garbutt* (C. C. A. 10th), 35 F. (2d) 924; *United States* v. *Fairall*, 16 F. (2d) 328; *United States* v. *McHatton*, 266 Fed. 602; *United States* v. *Klausner* (C. C. A. 2d), 25 F (2d) 608.

The existence of this right seems to have been assumed without discussion in *United States* v. *Updike*, 281 U. S. 489; *Russell* v. *United States*, 278 U. S. 181.

In addition to the remedies against transferees of corporate property afforded by the general equitable principles applied in the Federal courts, without restraint of State statutes or decisions, the United States could also have elected to pursue such other or additional remedies as were afforded

by State statutes, but it has been the general practice to proceed by suits in equity in the Federal courts.

Thus under the circumstances which exist in this case, the Government might have enforced its liability against the petitioners by a suit in equity[2] as it did in the *Updike case, supra.*[3]

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[2] Such equitable proceedings are founded on the principle that when the assets of a corporation are distributed to its stockholders without satisfying the claims of existing creditors, the stockholders become liable for the debts to the extent of the assets received. By many authorities this principle is treated as a limited application of the so-called "trust fund doctrine" and as such has received general support. *Graham* v. *Railroad Co.*, 102 U. S. 148; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371; *McDonald* v. *Williams*, 174 U. S. 397; *Pierce* v. *United States*, 255 U. S. 398; *Lawrence* v. *Greenup* (C. C. A. 6th), 97 Fed. 906. The cases cited have rejected the broader view that corporate assets at all times constitute a trust fund for its creditors. Cf. *Mumma* v. *Potomac Company*, 8 Pet. 281; *Curran* v. *State of Arkansas*, 15 How. 304; *Wood* v. *Dummer*, 3 Mason 308, but have recognized the stockholders' liability for corporate debts which arises in equity upon the insolvency or dissolution of the corporation. By other authorities this equitable liability has been linked with the doctrine of fraudulent conveyances. *McIver* v. *Hardware Co.*, 144 N. C. 478; *Luedecke* v. *Des Moines Cabinet Co.*, 140 Iowa 223; Pomeroy's Equity Jurisprudence, Secs. 907–908; 12 Yale Law Journal 63. By still others it has been identified with the law of implied contracts. *Owensboro Ditcher & Grader Co.* v. *Lucas* (W. D. Ky.), 18 F. (2d) 798, appeal dismissed on motion of appellant 22 F. (2d) 1015. Whatever the precise theory of such suit, the cases cited clearly disclose the existence of a right in equity to enforce collection of debts from transferee-stockholders.

[3] This might have been done either before or after the enactment of Section 280, for it does not provide an exclu-

Nor does Section 280 impose a new liability upon any other class of transferees. We believe it unnecessary to consider all of the classes of transferees which Section 280 was designed to reach. Some of the situations covered by Section 280 are suggested in the petitioners' brief, as, for example, fraudulent transfers of property between individuals, and transfers under contracts which imposed upon the transferee liability to pay the transferor's debts. See *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 F. (2d) 798, and H. R. 356, 69th Cong., 1st Sess., pp. 42–45. As to the liability of fiduciaries, Section 280 (a) (2) in specific terms enforces only those rights which the Government had under Section 3467 of the Revised Statutes (U. S. C., Title 31, Sec. 192.)

But we do not conceive that this Court in this case will find it necessary to define the limits of the applicability of Section 280. The significant fact about Section 280 is that it creates no new liability and that under this provision the Government will not be able to enforce any liability that it could not

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sive remedy. *United States* v. *Updike* (C. C. A. 8th), 32 F. (2d) 1, affirmed in 281 U. S. 489; *United States* v. *Greenfield Tap & Die Corp.* (D. Mass.), 27 F. (2d) 933. It should be noted, however, that in enacting the Revenue Act of 1928 a proposal was made to include an express provision to the effect that Section 280 was in addition to other proceedings and this was defeated, apparently in the belief that Section 280 was an effective and exclusive remedy. H. R. 2, 70th Cong., 1st Sess., p. 32; H. R. 1882, 70th Cong., 1st Sess., p. 22.

have enforced by other means before the statute was passed.

Section 280 (a) (1) provides in substance that the "liability, at law or in equity, of a transferee of property of a taxpayer" in respect of the tax imposed upon the taxpayer, with certain exceptions not here material, shall be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax." From this language it is clear that Section 280 is essentially a procedural provision to enforce existing liabilities. Obviously, loss of revenue and delay followed from the necessity of instituting a suit in equity or at law in every case where a transfer of assets rendered collection from the original taxpayer impossible. But until 1926 improvements gradually introduced in the method of assessment and collection as applied to the original taxpayers, including the creation of the Board of Tax Appeals by the Revenue Act of 1924, had left unchanged the procedure for the collection of taxes from transferees, notwithstanding the fact that the evasion or avoidance of taxes through the medium of a transfer of assets had increased owing to the high tax rates which followed the World War.

The procedure actually provided for in Section 280 is thus the same as that provided in the case of the original taxpayer and considered by this Court in the case of the *Old Colony Trust Co.* v.

Commissioner, supra. The transferee, like the taxpayer, has three alternatives: (1) He may, without paying the tax, file a petition with the Board of Tax Appeals for a redetermination of his liability, (2) he may voluntarily pay the amount of tax demanded, file a claim for refund, and upon its rejection sue for recovery, or (3) he may refuse payment and thus force collection by distraint or by suit.

If the transferee appeals to the Board as did the transferee in this case, under Sections 274 and 280 of the Revenue Act of 1926, *infra,* the subsequent procedure is identical with that considered by this Court in the *Old Colony Trust case, supra,* except that Section 912 of Title IX of the Revenue Act of 1924, added by Section 602 of the Revenue Act of 1928 (Appendix B, *infra,* p. 66), places the burden of proof upon the Commissioner to show that the petitioner is liable as a transferee of property of a taxpayer, though not to show that the taxpayer was liable for the tax, and Section 913, *infra,* gives the transferee the right to a preliminary examination of books, papers and other evidence of the taxpayer.

That Section 280 was enacted by Congress as an essential part of the tax-collecting system of the Government and that the procedure is the same as that employed in collecting amounts due from the original taxpayer has been demonstrated. We submit that the amount collected in this manner forms a part of the revenues of the Government,

and hence that the summary process against a transferee provided under Section 280 constitutes due process of law.

In the case of *United States* v. *Updike,* 281 U. S. 489, the transferee's liability was recognized as a liability for a tax. It was there urged by the Government that statutes of limitation relating to the collection of taxes from a corporation affected only the collection of taxes *qua* taxes and did not affect a suit in equity brought against the stockholders of a dissolved corporation under the trust fund theory. The Court rejected this contention, saying (p. 494):

> It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from § 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of § 278 (d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word "taxpayer" to bring within its meaning that person whose prop-

> erty, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.

Similarly, the Circuit Court of Appeals in the instant case and the Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroler*, 36 F. (2d) 208, certiorari denied, 281 U. S. 734, pointed out that the term "taxpayer" is not seriously inaccurate when applied "to the involuntary payer of the tax debt."

In the case of *Felland* v. *Wilkinson* (W.D. Wis.), 33 F. (2d) 961, the court said (p. 963):

> It must be borne in mind that while the liability of a transferee may not be a tax liability in the ordinary sense, nevertheless it is a liability for a tax; in other words, the government is seeking to collect what is primarily a tax and continues to be a tax although, because of the inability to collect from the taxpayer proper, it seeks to require his transferee to pay. From the standpoint of the government the money sought in this case is as much an item of revenue as it would be were the proceedings to collect directed toward the Stoughton Lumber Association. Hence from its standpoint the same necessity exists for the collection of tax liabilities resting upon transferees as exists in the case of taxpayers. * * *

There is consequently as great a public necessity for the prompt enforcement of the liability of transferees for the payment of taxes as existed

for the collection of amounts due from the collector in the *Hoboken Land and Improvement Company case,* and if legislation to compel the payment of the latter amounts by summary process is justified as necessary and proper legislation under the constitutional power of Congress to impose taxes, clearly the enactment of the same procedural measures for enforcing the liability of transferees as are employed in collecting taxes from the original taxpayers are likewise justified.

There are decisions of this Court upholding other provisions of revenue laws which bear a certain analogy to the question here involved. In *Taft* v. *Bowers,* 278 U. S. 470, this Court considered whether Congress could require the donee of property to report as profit from its sale the excess of selling price over the investment by the donor, notwithstanding the fact that part of this increment in value had accrued while the property was in the hands of the donor. In that case the provision was upheld as appropriate for enforcing a general scheme of taxation. Similarly, in *United States* v. *Phellis,* 257 U. S. 156, it was held that a taxpayer who buys stock shortly before the payment of a dividend may be required to assume the place of his predecessor and pay the tax on the entire dividend. In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld as an appropriate adjunct to the general scheme of taxation designed to prevent avoidance of estate taxes a provision for the inclusion in the gross estate of the value of property

held by the decedent and his wife as tenants by the entirety. See also *Milliken* v. *United States*, No. 87, October Term, 1930, decided March 2, 1931. The test is whether the legislation bears a reasonable relation to the enforcement of the tax. *Nigro* v. *United States*, 276 U. S. 332. In the language of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

We submit that the enactment of Section 280 fell within the limitation of Article I, Section 8, of the Constitution as legislation which was "necessary and proper" in the exercise of the power of taxation. The procedure adopted being reasonably connected with and appropriate to the exercise of that power, it was for Congress and it is not for the Court to determine the degree of the necessity. *Everard's Breweries* v. *Day*, 265 U. S. 545, 559; *Legal Tender Case*, 110 U. S. 421, 440.

The view that the summary process provided in Section 280 is justified as a necessary adjunct to the taxing power constituted one of the grounds on which the court below sustained the constitutionality of this section. The decision of the District Court for the Western District of Kentucky in the *Owensboro Ditcher & Grader Co.* v. *Lucas case*,

supra, is contra, and the decision of that court has been followed in *Felland* v. *Wilkinson*, *supra*, and in *Mid-Continent Petroleum Corporation* v. *Alexander* (W. D. Okla.), 35 F. (2d) 43. The Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroler*, *supra*, relied upon other grounds in upholding the constitutionality of the provision. The question involved in the *Owensboro Ditcher & Grader Company case*, the *Mid-Continent Petroleum Corporation case*, and the *Felland case*, was whether the transferee could secure an injunction to restrain the issuance and levy of a warrant of distraint to enforce the liability asserted against him under Section 280. The last two cases arose after the enactment of Section 604 of the Revenue Act of 1928, c. 852, 45 Stat. 791 (U. S. C. Sup. IV, Title 26, Section 2604), which specifically provides that no suit shall be maintained in any court for the purpose of restraining the assessment and collection of the transferee's liability. The Court in the *Mid-Continent Petroleum Corporation case* held Section 604 unconstitutional as a necessary result of the unconstitutionality of Section 280. In the *Felland case* the Court held that it was bound by Section 604 and accordingly its observations as to the constitutionality of Section 280 were not necessary to the decision.

Petitioners urge further that if the amount asserted against the transferee in this case is a tax it is beyond the power of Congress to impose a tax

of this character for the reasons (1) that it is not properly regarded as an income tax since it has no relation to the income of the transferee and is therefore either a direct tax not based on income and not apportioned among the States or an excise tax which lacks geographic uniformity, and (2) that, even if it may be regarded as an income tax because based upon the income of the corporation, the tax is not uniform throughout the United States, owing to differences in State statutes affecting the liability of transferees.

We submit that both contentions are without merit. The Government concedes that it is not seeking to collect a tax imposed upon the income of the transferee and that under Section 280 (a) (1) it seeks to enforce the liability of the transferee for income tax imposed upon the income of the corporation. But in *United States* v. *Updike, supra,* this Court not only held that a suit in equity to enforce the liability was in fact a proceeding to collect a tax but it also held that statutes of limitations relating to the collection of income taxes barred the proceeding.

In view of the decision in that case, we submit that Section 280 provides a procedure for collecting an *income tax,* notwithstanding the fact the tax is not imposed upon the income of the transferee. Hence under the Sixteenth Amendment, no consideration need be given to whether it meets the requirements of Article I, Section 2, Clause 3 of the Constitution that direct taxes be apportioned

among the several States according to their population.

The petitioners apparently make the same argument as to uniformity whether the tax be considered as an income tax or as neither an income tax nor a direct tax, but as some form of impost or excise (other than an income tax), namely, that the liability at law or in equity of a transferee differs materially in the various States and that the State may from time to time increase or decrease the transferee's liability and thus exercise powers confided by the Constitution exclusively to Congress.

The requirement of geographical uniformity is applied to income taxes as well as to other excise taxes. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1. But lack of geographical uniformity does not result from the fact that there may be differences in the State statutes which will affect the liability of the transferee or destroy it. So long as the Act uniformly applies to conditions which call its provisions into play wherever they may be found, the fact that due to local laws or conditions there may in some States be no subjects upon which to impose the tax is immaterial. *Head Money Cases*, 112 U. S. 580; *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, 326. The situation is analogous to that presented in *Crooks* v. *Harrelson*, 282 U. S. 55, where this Court held that all real estate situated in Missouri belonging to a resident of that State at the time of his death was exempt from

Federal estate taxes under the Revenue Act of 1918, because of the fact that in that jurisdiction, unlike most others, real estate is not subject to the payment of administration expenses and hence does not come within the provisions of Section 402 (a) of that Act. Uniformity, in the sense contended for by petitioners here, was lacking in that case, but the Court upheld the tax.

The incidence of the Federal income tax and other excise taxes is in many instances indirectly affected by State laws. One example is the community property laws which materially reduce the amount of income taxes collected in States where that form of property exists. *Poe* v. *Seaborn*, 282 U. S. 101. Nor has it ever been held that a State may not alter its laws so that its citizens may be more advantageously situated with reference to Federal taxation. Cf. *United States* v. *Malcolm*, decided January 19, 1931, No. 512 on the docket of this Court for the present term.

II

EVEN IF SECTION 280 IS NOT TO BE REGARDED AS A REVENUE PROVISION, IT IS CONSTITUTIONAL

If it should be held that the enforcement of a transferee's liability for unpaid taxes of a dissolved corporation is not incidental to the taxing power, it is our position that Section 280 is nevertheless constitutional.

The essence of the petitioners' complaint is not that they, as executors of the estate of I. L. Phillips, have been deprived of property by an illegal assessment and collection, but that the liability of the transferee Phillips is being enforced by a "summary procedure" which does not provide for a judicial determination of liability at the outset.

They urge that the fact that the Commissioner and the Board have the right in the first instance to determine this liability violates the due process clause and the constitutional principle of the separation of powers. Petitioners assert that the legal or equitable liability of a transferee of property can only be initially determined in a court.

It should be noted that the petitioners came to the Board of Tax Appeals of their own volition and thus exercised an election to have their liability determined by the procedure provided in Section 280. There were other courses open to them. They might have paid the Collector under protest and sued at law for recovery, thus securing the advantage of a judicial determination of their liability in the first instance. It is conceded that this procedure would have been less desirable than an appeal to the Board in that it would have required the payment of the tax before securing a review of the Commissioner's determination, but it was at least an alternative remedy which would have given the petitioners a judicial review and a jury trial

such as they insist upon. They might also have refused payment and forced collection by distraint or by suit.

Owing to this opportunity for an election, the Board of Tax Appeals in this case, in *Henry Cappellini* v. *Commissioner*, 14 B. T. A. 1269, and in a number of other cases has refused to pass upon the constitutionality of Section 280, holding that a transferee who has exercised the option to appeal to the Board is estopped from questioning the validity of Section 280. In view of the fact that the Circuit Court of Appeals in the exercise of its right to review clearly had the power to pass upon the constitutionality of Section 280 and has held that it is constitutional without deciding whether the Board improperly refused to determine its validity, we do not believe that this Court will find it necessary to decide whether there was any estoppel.[4]

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[4] The Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Tyroler*, 36 F. (2d) 208, certiorari denied, 281 U. S. 734, stated that there was no estoppel, though that issue was not directly involved there and the statement may be regarded as *obiter*. The Board in the *Capellini case* relied upon the principle that one can not invoke the aid of a statute (as petitioners did by taking an appeal to the Board) and at the same time attack the validity of the statute so invoked. The authorities cited by the Board give support to this theory but to a certain extent are distinguishable on the facts. For example, *Great Falls Mfg. Co.* v. *Att'y General*, 124 U. S. 581, and *Merchants Heat & L. Co.* v. *Clow & Sons*, 204 U. S. 286, are cases where the party questioning the constitutionality of a statute has at the same time sought to recover a sum of money under it. *Daniels* v. *Tearney*, 102 U. S. 415, and *Wall* v. *Parrot Sil-*

In urging that the transferee has been deprived of a judicial determination of his liability the petitioners fail to give adequate consideration to the fact that a judicial determination is granted through the provision for review of the Board's decision by the Circuit Court of Appeals. We submit that the court below correctly held that the provision for review by the Circuit Court of Appeals affords due process without taking into consideration the alternative remedy of a suit to recover the tax after the payment. Sections 1001 to 1003 of the Revenue Act of 1926 (Appendix A, *infra*, pp. 55–57). See also *Routzahn* v. *Tyroler, supra*. The decision in the *Owensboro Ditcher & Grader Company case* is not *contra*, for that court in holding that Section 280 denied due process to the transferee did not give any consideration to his right to appeal from the Board of Tax Appeals to the Circuit Court of Appeals. The same thing may be said of the decisions in the *Mid-Continent Petroleum Corporation case, supra*, and the *Felland case, supra*.

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ver & Copper Co., 244 U. S. 407, are cases where in one action or transaction a party has claimed the benefit of a statute and in a subsequent action growing out of the same transaction seeks to prove it invalid. In *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208, the alternative remedy consisted in waiting to be sued instead of, as in this case, paying the amount and suing to recover. The position of a transferee is to some extent unique, for while he takes the appeal to the Board he is in the position of defending himself from the exaction of the Commissioner. For all of these reasons, we do not urge this point.

The conclusion of the court below that the review by the Circuit Court of Appeals suffices to afford the transferee due process is clearly correct. That the Circuit Courts of Appeals necessarily exercise judicial powers in reviewing decisions of the Board is settled by the *Old Colony Trust Company case, supra.* Section 1001 (b) of the Revenue Act of 1926 (Appendix A, *infra*, p. 55). The Circuit Courts of Appeals have power to affirm, or if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a hearing as justice may require. Section 1003 (b), *infra.*

The petitioners' position that a judicial determination is not secured appears to be based on the fact that the transferee's liability is not determined in the first instance by a court.

It is well settled that due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Co., supra; Reetz* v. *Michigan,* 188 U. S. 505. As pointed out in those cases, the essential requirements of due process of law are notice and an opportunity to be heard. Whether these requirements are met in a particular case depends largely upon the nature of the proceeding and the character of the rights which may be affected by it. *Hurwitz* v. *North,* 271 U. S. 40.

This Court has repeatedly sustained statutes relating to the enforcement of public rights where the determination of liability in the first instance

is made by administrative officers or boards, not only in revenue cases, but in other cases as well. The test is whether the statute gives an opportunity for a hearing commensurate with the necessities of the case and the character of the rights affected, and a judicial review is not always essential. *Hagar* v. *Reclamation District No. 108, supra; Hurwitz* v. *North, supra; United States* v. *Ju Toy,* 198 U. S. 253; *Int. Com. Comm.* v. *Louis. & Nash. R. R.,* 227 U. S. 88; *Lent* v. *Tillson,* 140 U. S. 316; Cooley's Constitutional Limitations, 8th Edition, Vol. II, Chap. XI, pp. 733–745. For example, the Secretary of Labor may exercise the power to exclude aliens and impose penalties upon steamship companies violating a statute which prohibits the bringing of diseased immigrants into the United States without the right of a complete judicial review. *The Japanese Immigrant case,* 189 U. S. 86; *United States* v. *Ju Toy, supra; Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320. The Post Office Department may deny the use of mails to those attempting to defraud the public. *Public Clearing House* v. *Coyne,* 194 U. S. 497. The Secretary of the Interior exercises broad powers with reference to the public lands. *Burfenning* v. *Chicago, St. Paul &c. Ry.,* 163 U. S. 321. Broad powers of a quasi-judicial nature, involving determination of facts and in some cases the application of rules of law thereto have been conferred on various other agencies of the Government. *Int. Com. Comm.* v. *Louis. & Nash. R. R., supra; United*

States v. *Los Angeles R. R. Co.*, 273 U. S. 299; *Silberschein* v. *United States*, 266 U. S. 221; *Federal Trade Comm.* v. *Pacific Paper Ass'n*, 273 U. S. 52. It is generally considered that due process is afforded the individual through the right of an appeal to an administrative body and through the right to a subsequent judicial review even where such review is limited to the question as to whether there has been an abuse of discretion or a violation of some constitutional principle. See *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, *supra*.[5]

Thus Congress may confer upon administrative officers and bodies even greater powers than have been conferred upon the Commissioner and the Board in determining the liability of a transferee under Section 280. It is pointed out that the Commissioner's determination is only *prima facie* correct (*Saxman Coal & Coke Co.* v. *Commissioner*

[5] The decisions in regard to violations of the due process clause of the 14th Amendment are in accord. In *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U. S. 440, the Court sustained a State statute requiring all claimants to the use of certain water to submit their claims to an administrative board and to make the preliminary order of the board effective pending review by a court unless a bond is filed to cover damages that may accrue. For other illustrations, see *Hawkins* v. *Bleakly*, 243 U. S. 210; *Hall* v. *Geiger-Jones*, 242 U. S. 539; *Title Guaranty Co.* v. *Allen*, 240 U. S. 136. Where the police powers of the States are involved the powers of executive officers and boards are even less subject to attack. *Hurwitz* v. *North*, *supra*; *North American Storage Co.* v. *Chicago*, 211 U. S. 306.

(C. C. A. 3rd), 43 F. (2d) 556; *Avery* v. *Commissioner* (C. C. A. 5th), 22 F. (2d) 6), and the Commissioner has the burden of proving the transferee's liability before the Board. There is nothing so unusual or obscure about a transferee's liability to the United States for taxes unpaid by his transferor as to require safeguards other than those assured by the statute in its determination. It is significant that under the English common law all debts due the Crown regardless of their source could be collected by summary process. *Murray's Lessee* v. *Hoboken Land & Improvement Co., supra.*

The procedure for the determination of this liability by the Board is not to be condemned because it is new. *Hurtado* v. *California,* 110 U. S. 516.

The due process clause has to do with matters of substance rather than matters of form. *Simon* v. *Craft,* 182 U. S. 427. In substance the procedure before the Board gives the transferee a fair hearing and enables the Circuit Court of Appeals to make an adequate review. The proceedings before the Board are substantially like proceedings in equity or in a civil case where a jury is waived. The rules of evidence applicable in the courts of equity in the District of Columbia control. Section 907 (a) of the Revenue Act of 1924, as amended (Appendix A, *infra,* pp. 50–51). The hearing is open to the public. Section 907 (a), *infra.* Witnesses may be subpœnaed and depositions taken. Section

908, *infra*. The rules of the Board require the filing of petition and answer and permit the filing of briefs and the presentation of oral arguments. The Board makes findings of facts, or renders an opinion, or both.

The fact that the transferee is compelled to assume the position of a plaintiff in a proceeding before the Board seems to be without significance. As a practical matter, the Commissioner by sending the notice of deficiency inaugurates the proceeding, and the petition filed with the Board more closely resembles an answer than a complaint. It should be noted that the burden of proving that the transferee is liable as such is upon the Commissioner and that only the burden of proving the taxpayer not liable for the tax is upon the transferee. Section 602 of the Revenue Act of 1928, adding Section 912 to the Revenue Act of 1926 (Appendix B, *infra*, p. 66). Consequently, the situation as to the proof of the transferee's liability is the same as it was before the enactment of Section 280, for before the adoption of the section a determination by the Commissioner of the amount due from a taxpayer would have been *prima facie* correct and the burden of proving the liability of the transferee would have been on the Government. It can not be presumed that the Board of Tax Appeals would apply these rules unfairly or that the transferee would not obtain as fair a hearing as he would get in a constitutional court.

The transferee is not deprived of the means of securing information necessary to his defense but on the contrary he is extended aid for that purpose. He is granted the right of a preliminary examination of the books and records of the taxpayer and if necessary the Board will issue a subpœna. Section 602 of the Revenue Act of 1928, adding Section 913 to the Revenue Act of 1924 (Appendix B, *infra*, p. 66).

While it is true, as suggested by the petitioners, that a transferee can not bring other transferees into the proceeding before the Board, that situation does not deprive him of any substantial right, for it does not affect his right to contribution. It is generally understood that the right to bring in other parties in an equitable action such as might have been instituted in this case independently of Section 280 does not exist for the benefit of the litigant but for the benefit of the court to prevent a multiplicity of suits. See *Hale* v. *Allison*, 188 U. S. 56. It has generally been held that nonjoinder is not a ground for dismissing a bill of this kind. *Pierce* v. *United States*, 255 U. S. 398. Cf. *United States* v. *Armstrong*, *supra*.

The contention that the statute is unconstitutional on the ground that it confers judicial powers upon the Commissioner or the Board may be readily disposed of, for it is obvious that neither exercises judicial powers within the meaning of the Constitution. In so far as the Commissioner is

concerned his preliminary determinations as to a transferee's liability are not different from what they were prior to the enactment of Section 280, when they formed the basis of a suit in equity to enforce a transferee's liability. The Board's determinations are quasi-judicial, rather than judicial. *Goldsmith* v. *Bd. of Tax Appeals*, 270 U. S. 117; *Blair* v. *Oesterlein Co.*, 275 U. S. 220.

In a broad sense all administrative duties, the performance of which involves an inquiry into the existence of facts and the application to them of rules of law, are duties of a judicial nature. *Murray's Lessee* v. *Hoboken Land & Improvement Co., supra.* But such duties are regularly performed by executive officers without recourse to preliminary judicial determinations and if they could not perform them the machinery of the Government would stop. *Weyerhaeuser* v. *Minnesota*, 176 U. S. 550. In the latter case there was involved a Minnesota statute providing that when it should appear to the Governor that there had been a gross undervaluation of taxable property in any county, he should appoint a board to revalue and reassess it. It was objected that the statute was unconstitutional in that it conferred judicial authority upon the Governor. In rejecting that contention the Court said (p. 556):

> If the basis of the complaint is that the Governor acts judicially and plaintiffs in error were entitled to have notice, and be

heard before he rendered judgment, it is also untenable. The Governor does not act judicially—he determines nothing but that a complaint has been made in writing and under oath, or that it has been found by a court, or the legislature or any committee thereof, that a considerable amount of property in a county of the State has been grossly undervalued. If the perception of the fact of a complaint or a finding of a court or legislature is a judgment in the sense urged, every act of government is a judgment, and all of its exercises could be stopped, upon the reasoning of plaintiffs in error, by perpetual hearings. But supposing the Governor's act is a judgment, it ends with the appointment of an examiner. What is substantial comes afterwards, and if against what may be detrimental in that the landowner can be heard, he is afforded due process within the rule announced by the authorities, *supra*.

See also *Reetz* v. *Michigan, supra; Shoemaker* v. *United States,* 147 U. S. 282; *Hoff* v. *Jasper County,* 110 U. S. 53.

It is recognized that there is a distinction between conferring duties of a judicial nature upon an official by giving him the right to exercise judgment and discretion and conferring upon him judicial power such as is referred to in the Constitution. *United States* v. *Ferreira,* 13 How. 39.

We submit that there is no constitutional prohibition against conferring quasi-judicial powers upon an executive board or officer, and it has gen-

erally been taken for granted that such powers may be conferred without violating the principle of separation of powers.* See for example, the decision of this Court in the *Old Colony Trust Company case, supra.*

The principle of the separation of powers is more relative than absolute. *Evans* v. *Gore,* 253 U. S. 245. Chief Justice Taft in the case of *Hampton & Co.* v. *United States,* 276 U. S. 394, 405–406, which involved the question of the exercise of legislative power by the President, said that constitutional boundary must be fixed "according to common sense and the inherent necessities of the governmental coordination." An illustration of this rule may be found in cases upholding the delegation to an administrative body of the power to make rules and regulations, which is in the nature of a legislative function. *United States* v. *Grimaud,* 220 U. S. 506.

It is, of course, a settled principle of law that every presumption is in favor of the constitutionality of an Act of Congress. *Nicol* v. *Ames,* 173 U. S. 509; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *United States* v. *Bennett,* 232 U. S. 299; *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 369.

* See article in 29 Columbia Law Review, 1052 (1929), by Harold C. Havighurst, "The Constitutionality of the Transferee Provisions of the Revenue Acts," in which the writer concludes that Section 280 is constitutional.

III

THE TRANSFEREES ARE JOINTLY AND SEVERALLY LIABLE FOR THE TAX TO THE EXTENT OF THE ASSETS RECEIVED BY THEM

In the event that the Court holds that Section 280 is constitutional, the petitioners urge further that their liability as executors of the estate of the transferee is limited to such portion of the corporate tax as is the ratio of the transferee's stock to the whole capital stock outstanding at the time of its dissolution.

The court below held that the transferee's liability is measured by the assets distributed to him, and that as the transferee in this case received assets in excess of the amount of the tax he was liable for the entire tax.

This view coincides with the decision of this Court in the case of *Hatch* v. *Dana*, 101 U. S. 205, where in answer to the contention that all the necessary parties had not been joined in a creditor's bill to obtain payment of a judgment against an insolvent corporation from unpaid stock subscriptions, the Court said (p. 210):

> The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced

against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. * * *

To the same effect is *Ogilvie* v. *Knox Insurance Co.*, 22 How. 380.

It is true that those cases involved actions to enforce payment of a corporate debt from unpaid stock subscriptions, whereas in the instant case the Government is seeking to collect its tax debt from assets distributed to the stockholders. This distinction is immaterial, for there was no statute relied upon in either case and liability was enforced under the "trust fund" doctrine.

While the decisions of both Federal and State courts are not entirely harmonious, the view of this Court in *Hatch* v. *Dana*, *supra*, has been generally followed where the stockholder's liability which is being enforced is not a statutory liability.

In re Phoenix Hardware Co. (C. C. A. 9th), 249 Fed. 410; *Blood* v. *La Serena Land, etc., Co.*, 150 Cal. 764; *Singer* v. *Hutchinson*, 183 Ill. 606; *Adams* v. *Perryman & Co.*, 202 Ala. 469; *Kimbrough* v. *Davies*, 104 Miss. 722; *Cooper* v. *Security Co.*, 127 N. C. 219; *Bartlett* v. *Drew*, 57 N. Y. 587; Fletcher on Corporations, Vol. VI, Sec. 4127. Where the liability is dependent upon a statute no general rule can be stated, for it depends upon the phraseology of the statute. *Terry* v. *Little*, 101 U. S. 216. Even in such cases the weight of authority appears to favor the rule that unless the statute expressly provides for a joint liability, the liability is several rather than joint. *Terry* v. *Little, supra*; *Hodges & Wilson* v. *Silver Hill Mining Co.*, 9 Or. 200; *Hall & Co.* v. *Klinck*, 25 S. C. 348; Fletcher on Corporations, Vol. VI, Sec. 4127.

In the following cases the courts have held, as did the court below, that stockholders of a dissolved corporation are severally liable for the payment of corporate taxes to the extent of the assets received. *Pann* v. *United States, supra; Capps Mfg. Co.* v. *United States, supra; United States* v. *Boss & Peake Automobile Co.*, 285 Fed. 410, affirmed, *Boss* v. *United States* (C. C. A. 9th), 290 Fed. 167; *United States* v. *McHatton* (D. Mont.), 266 Fed. 602.

The petitioners rely upon *United States* v. *Armstrong, supra; United States* v. *Updike, supra; United States* v. *Snook*, 24 F. (2d) 844; and *Wood* v. *Dummer*, Fed. Cas. 17944 as authority for the

proportionate liability which they contend is the proper measure in this case if Section 280 is constitutional.

The *Snook case* is not opposed to our position. In that case there were only two stockholders. It was held that it was not misjoinder to sue both stockholders at once and that in a suit against both payment should be proportioned according to the assets received by each. The court indicated, that if one were insolvent, the entire amount could be recovered from the other and that the liability was several. Moreover, upon appeal the case was decided on other grounds by the Circuit Court of Appeals for the Fifth Circuit, *Austin* v. *United States*, 28 F. (2d) 677, and that court in the *Capps Manufacturing Company case, supra,* held the stockholder liable to the extent of the assets received.

The observation in the *Updike case* quoted by petitioners (Br. 43) was dictum, for all stockholders were parties to the suit. They were held liable in proportion to the amounts received in distribution. In the case of *United States* v. *Armstrong, supra,* however, the same Circuit Court of Appeals went further and held that all transferees within the jurisdiction should be made parties defendant or their absence explained, and that since all had not been made parties those before the court should be liable only for their pro rata shares of the transferee's liability. While this case does to some extent support the petitioners' position, it should be

noted that it is based upon equity rules regarding parties and is not in reality a decision regarding the extent of the transferee's liability "in law or in equity." The court, moreover, recognized that the failure to join all parties was open to explanation, and it held with respect to two stockholders who had not properly raised the question of nonjoinder that the right to complain had been waived.

The decision in *Wood* v. *Dummer, supra,* indicated that all stockholders are not necessary parties and the basis for holding the stockholders liable in proportion to their stock ownership appears to have been the peculiar circumstances of that case adverted to by Justice Story (30 Fed. Cas. 440).

It is significant that in enacting Section 280 Congress considered that the liability of each transferee is equal to the amount of assets received. In the House Conference Statement, H. R. 356, 69th Cong., 1st Sess., pp. 42–45, this statement was made (p. 43):

> By reason of the trust fund doctrine and various State statutory provisions the transferee of assets of an insolvent transferor is ordinarily liable for the accrued and unpaid taxes of the transferor. The amount of such liability is not in excess of the assets received and the transferee has a right of recoupment against other transferees of the assets of the same taxpayer, if the transferee is held liable in excess of his pro rata share of the tax liability of the transferor. * * *

It is submitted that the above is a correct statement of the law. It is not the duty of the Government to marshal the assets of a dissolved corporation and to adjust the rights of the various stockholders; it may follow the *res*, seize it wherever found, and leave the stockholders to make their own adjustments. Whether the transferees be regarded as tort-feasors in a constructive fraud, or merely as the receivers of trust funds which rightfully belong to others, their liability is both joint and several.

Petitioners contend that the assessment was barred by the Pennsylvania statute of limitations. The liability of the transferees was not based upon a statute of Pennsylvania but upon general equitable principles. Section 280 contains provisions for the limitation of assessments against transferees, and this is the sole limitation which bars the United States from assessing the liabilities provided by Section 280 upon transferees, for the United States is not bound by State statutes of limitations unless Congress has expressly provided that it shall be. *Ches. & Del. Canal Co.* v. *United States*, 250 U. S. 123; *United States* v. *Insley*, 130 U. S. 263; *United States* v. *Beebe*, 127 U. S. 338.

As the brief submitted by *amici curiæ* advances substantially the same arguments against the constitutionality of Section 280 as do the petitioners, we have deemed it unnecessary to deal with it separately.

CONCLUSION

Section 280 imposes no new liability but provides a practical and efficient process for the collection of Government revenue. It affords complete protection to the rights of transferees and is not in conflict with the Constitution. The court below has properly held that the petitioners are liable for the entire amount of unpaid taxes of the Coombe Garment Company inasmuch as the amount of those taxes is less than the sum which was distributed to the decedent without consideration.

Accordingly, the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APRIL, 1931.

APPENDIX A.

GENERAL PROVISIONS OF THE REVENUE ACTS RELATING TO THE BOARD OF TAX APPEALS

1. Sections 900 to 911 of Title IX of the Revenue Act of 1924, c. 234, 43 Stat. 253, 336–340 (U. S. C., Title 26, Secs. 1211–1222) as Amended by Title X, Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 105–113 (U. S. C. App., Title 26, Secs. 1211–1223), and Title IV, Section 601 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 871–873 (U. S. C. Sup. IV, Title 26, Secs. 1211–1223)

TITLE IX.—BOARD OF TAX APPEALS

MEMBERSHIP OF BOARD

SEC. 900. The Board of Tax Appeals (hereinafter referred to as the "Board") is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

SEC. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. Members of the Board may be removed by the President,

after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

SEC. 902. A member of the Board removed from office in accordance with subdivision (a) of section 901 shall not be permitted at any time to practice before the Board.

ORGANIZATION AND PROCEDURE

SEC. 903. The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

SEC. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be

fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

SEC. 905. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division, respectively.

SEC. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period

the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board.

(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

(d) A decision of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as

its decision that there is no deficiency in respect of such tax.

(f) The findings of the Board made in connection with any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be *prima facie* evidence of the facts therein stated.

SEC. 907. (a) Notice and opportunity to be heard upon proceeding instituted before the Board shall be given to the taxpayer and the Commissioner, and a report upon the proceedings and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board. If an opportunity to be heard upon the proceeding is given before a division of the Board, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Board upon review, except upon a specific order of the chairman. Hearings before the Board and its divisions shall be open to the public, and the testimony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable

in courts of equity of the District of Columbia. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, decision, order, notice, or process.

(b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions, and memorandum opinions.

(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted

for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

(e) The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

(f) The Secretary of the Treasury shall provide the Board with suitable rooms in the courthouses or other buildings when necessary for hearings by the Board, or any division thereof, outside the District of Columbia.

WITNESSES

SEC. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence,

from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.

SEC. 909. (a) Any witness summoned or whose deposition is taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

EXPENDITURES AND PERSONNEL.

SEC. 910. The members of the Board shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be applicable to the Board of Gen-

eral Appraisers. The employees of the Board shall receive their necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, in an amount not to exceed $5 per day. The Board is authorized in accordance with the Classification Act of 1923 to fix the compensation of, such employees, and to make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals), as may be necessary efficiently to execute the functions vested in the Board. All expenditures of the Board shall be allowed and paid, out of any moneys appropriated for the purposes of the Board, upon presentation of itemized vouchers therefor signed by the chairman. All fees received by the Board shall be covered into the Treasury as miscellaneous receipts. Section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Board when the aggregate amount involved does not exceed the sum of $25.

FRIVOLOUS APPEALS TO THE BOARD

SEC. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax.

2. Section 1001 of the Revenue Act of 1926, as Amended by Section 603 of the Revenue Act of 1928

COURT REVIEW OF BOARD'S DECISION

SEC. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, condi-

tioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax law. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated.

3. Section 1002 of the Revenue Act of 1926.

VENUE

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

4. Section 1003 of the Revenue Act of 1926.

JURISDICTION

SEC. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.

5. Section 1004 of the Revenue Act of 1926.

FILING FEE

SEC. 1004. (a) The Circuit Courts of Appeals, the Court of Appeals of the District of Columbia, and the Supreme Court shall have power to impose

damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay.

(b) The Board is authorized to fix a fee, not in excess of the fee fixed by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing, a transcript of the record.

6. Section 1122 (a) of the Revenue Act of 1926.

JURISDICTION OF COURTS

SEC. 1122. (a) If any person is summoned under this Act to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

APPENDIX B

PROVISIONS OF REVENUE ACTS RELATING TO THE ENFORCEMENT OF THE LIABILITY OF TRANSFEREES

1. Section 280 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61 (U. S. C. App., Title 26, Sec. 1069) as Amended by Section 505 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870 (U. S. C. Sup. IV, Title 26, Sec. 1069)

CLAIMS AGAINST TRANSFERRED ASSETS

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the

same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect to the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within

either of the above periods, then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

2. Sections 273 and 274 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 55–57 (U. S. C. App., Title 26, Secs. 1047–1049, 1054). Section 280 incorporated by reference.)

DEFICIENCY IN TAX

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(2) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day

period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

(d) The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subdivison (a) of this section on the assessment and collection of the whole or any part of the deficiency.

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the

amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, for the purposes of this subdivision or of subdivision (a) of this section, or of subdivision (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

(g) The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years

as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

(h) For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005.

(i) If the taxpayer has elected to pay the tax in installments and a deficiency has been assessed, the deficiency shall be prorated to the four installments. Except as provided in section 279, that part of the deficiency so prorated to any installment the date for payment of which has not arrived, shall be collected at the same time as and as part of such installment. That part of the deficiency so prorated to any installment the date for payment of which has arrived, shall be paid upon notice and demand from the collector.

(j) Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under subdivision (d) of this section, to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

(k) Where it is shown to the satisfaction of the Commissioner that the payment of a deficiency upon the date prescribed for the payment thereof will result in undue hardship to the taxpayer the Commissioner, with the approval of the Secretary (except where the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax), may grant an extension for the payment of such deficiency or any part thereof for a period not in excess of eighteen months. If an extension is granted, the Commissioner may require the taxpayer to furnish a bond in such amount, not exceeding double the amount of the deficiency, and with such sureties, as the Commissioner deems necessary, conditioned upon the payment of the deficiency in accordance with the terms of the extension. In such case there shall be collected, as a part of the tax, interest on the part of the deficiency the time for payment of which is so extended, at the rate of 6 per centum per annum for the period of the extension, and no other interest shall be collected on such part of the deficiency for such period. If the part of the deficiency the time for payment of which is so extended is not paid in accordance with the terms of the extension, there shall be collected, as a part of the tax, interest on such unpaid amount at the rate of 1 per centum a month for the period from the time fixed by the terms of the extension for its payment until it is paid, and no other interest shall be collected on such unpaid amount for such period.

3. Sections 912 and 913 of Title IX of the Revenue Act of 1924 (U. S. C. Sup. IV, Title 26, Secs. 1229, 1230) Added by Section 602 of the Revenue Act of 1928

TRANSFEREE PROCEEDINGS

SEC. 912. In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.

SEC. 913. Upon application to the Board, a transferee of property of a taxpayer shall be entitled, under rules prescribed by the Board, to a preliminary examination of books, papers, documents, correspondence, and other evidence of the taxpayer or a preceding transferee of the taxpayer's property, if the transferee making the application is a petitioner before the Board for the redetermination of his liability in respect of the tax (including interest, penalties, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer. Upon such application the Board may require by subpœna, ordered by the Board or any division thereof and signed by a member, the production of all such books, papers, documents, correspondence, and other evidence within the United States the production of which, in the opinion of the Board or division thereof, is necessary to enable the transferee to ascertain the liability of the taxpayer or preceding transferee and will not result in undue hardship to the taxpayer or preceding transferee. Such examination shall be had at such time and place as may be designated in the subpœna.

4. Section 604 of the Revenue Act of 1928 (U. S. C. Sup. IV, Title 26, Sec. 3604)

SUITS TO RESTRAIN ENFORCEMENT OF LIABILITY OF TRANSFEREE OR FIDUCIARY

SEC. 604. No suit shall be maintained in any court for the purpose of restraining the assessment or collection of (1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any income, war-profits, excess-profits, or estate tax, or (2) the amount of the liability of a fiduciary under section 3467 of the Revised Statutes in respect of any such tax.

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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930—No. 455.

ANNIE G. PHILLIPS, ARTHUR L. PHILLIPS, SEYMOUR PHILLIPS, and ABRAHAM S. PHILLIPS, Executors of the Estate of I. L. Phillips, Deceased,

Petitioners,

against

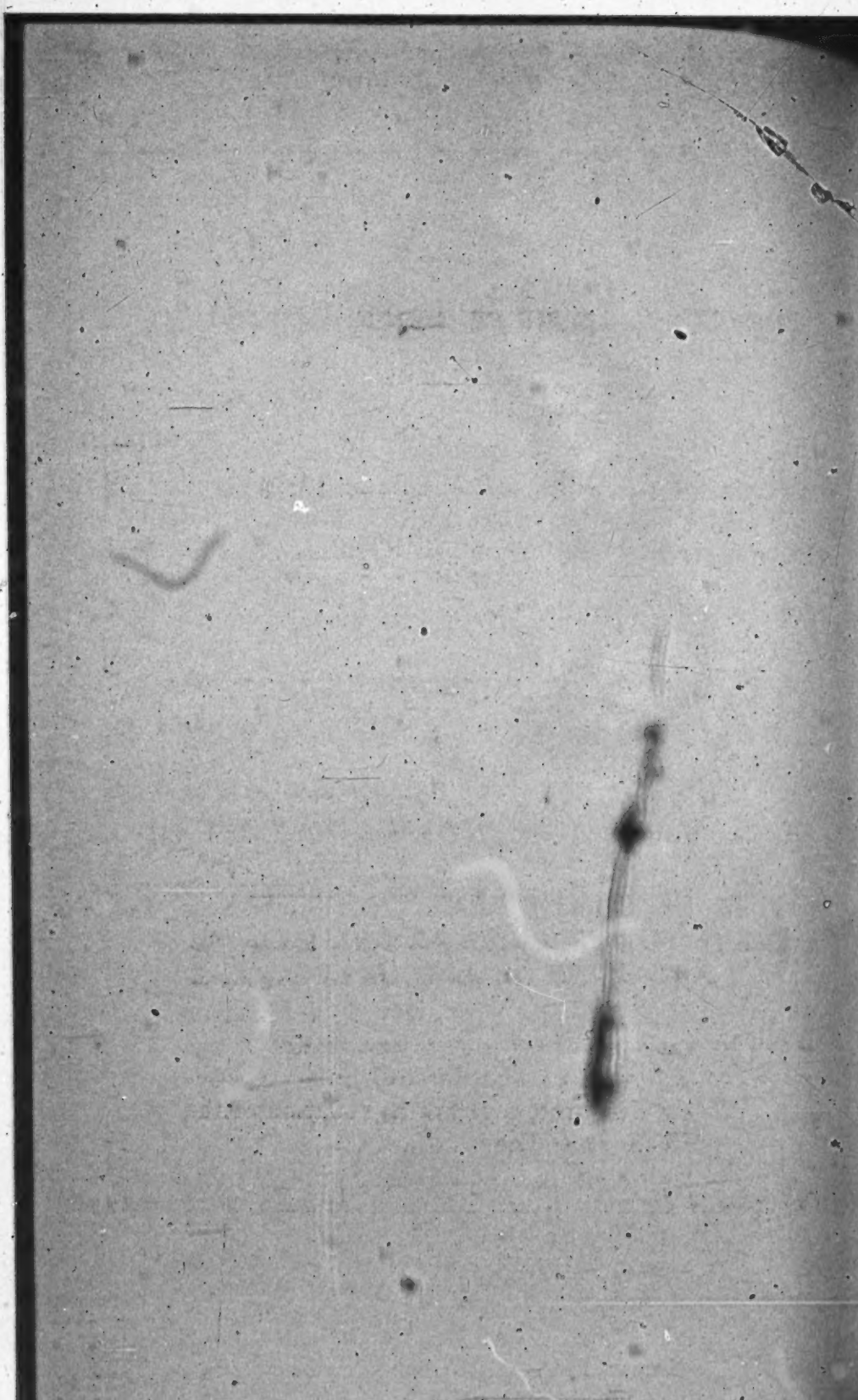
COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION OF SOUTH PENN OIL COMPANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

OSCAR R. EWING,
Counsel for South Penn Oil Company as Amicus Curiae.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.



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Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

May it Please the Court:

The undersigned, as counsel for South Penn Oil Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

OSCAR R. EWING,
Counsel for South Penn Oil Company as *Amicus Curiae.*

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Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF SOUTH PENN OIL COMPANY, AS *AMICUS CURIAE*.

I.

Preliminary Statement.

South Penn Oil Company, which submits this brief, is the petitioner in the case of *South Penn Oil Company* v. *Commissioner*, 20 B. T. A. 1180, in which the United States Board of Tax Appeals affirmed a determination of the Commissioner of Internal Revenue that there was assessable against South Penn Oil Company under Section 280 of the Revenue Act of 1926 a transferee liability for certain unpaid taxes of Big Creek Development Company, a West Virginia corporation dissolved in 1917, because of the receipt of assets of the taxpayer. South Penn Oil Company has filed a petition for the review of the decision of the

Board of Tax Appeals by the Court of Appeals of the District of Columbia.

In both the South Penn Oil Company case and the present case, the transfers of assets, upon the basis of which the transferee liability is asserted, occurred several years before the enactment of the Revenue Act of 1926. Two contentions made by the South Penn Oil Company in its case with respect to Section 280, however, are not directly presented by the petitioners in the present case. They are, (1) that Section 280 does not apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment, and (2) that if it does apply retrospectively in this respect it is unconstitutional as to such a transferee.

Because of the possibility that the decision of this Court in the present case may uphold the constitutionality of Section 280 and foreclose the presentation of these contentions to this Court in its own case, South Penn Oil Company presents them in this brief and respectfully requests that this Court consider them in the present case or expressly reserve them for future consideration.

II.

ARGUMENT.

Summary of Argument.

POINT I—Section 280 of the Revenue Act of 1926 does not apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment.

POINT II—If Section 280 of the Revenue Act of 1926 applies retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment, it deprives such a transferee of property without due process of law in violation of the Fifth Amendment.

POINT I.

Section 280 of the Revenue Act of 1926 does not apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment.

The portions of Section 280 of the Revenue Act of 1926 (44 Stat. 61) which are material to the present consideration are as follows:

> "(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):
>
> "(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act."

This section does not expressly apply to a transferee with respect to property of a taxpayer transferred before its enactment, and nothing in it indicates that Congress intended that it have any such application.

The decisions of this Court have established a rule that statutes will not be construed as applying retrospectively unless the intention that they be so applied is clearly expressed or necessarily implied in them. *Shwab* v. *Doyle*,

258 U. S. 529; *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Railway Co.*, 266 U. S. 435; *United States* v. *St. Louis, San Francisco & Texas Railway Co.*, 270 U. S. 1; *Union Pacific Railroad Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190; *Lewellyn* v. *Frick*, 268 U. S. 238.

The case of *Shwab* v. *Doyle*, *supra*, like the present case, involved the question whether a statute would be construed as retrospectively applicable to a transfer made before its enactment. It was there held that Section 202 of Chapter 463 of the Act of September 8, 1916 (39 Stat. 777), which imposed a tax on the transfer of the net estate of every decedent dying after its passage to the extent of any interest therein of which the decedent had at any time made a transfer, except a *bona fide* sale, in contemplation of death, did not apply to transfers made before its passage. In its opinion, this Court said (pp. 534-535):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. I Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 578; *White* v. *United States*, 191 U. S. 545; *Gould* v. *Gould*, 245 U. S. 151; Story, Const., §1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'
>
> "There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. *It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.*

"The Act of September 8, 1916, is within the condemnation.

"There is certainly in it no declaration of retroactivity, 'clear, strong and imperative', which is the condition expressed in *United States* v. *Heth*, 3 Cranch, 398, 413; also *United States* v. *Burr*, 159 U. S. 78, 82-83.

"*If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected.*" (Italics ours.)

If applicable to transferees with respect to transfers made before its passage, Section 280 of the Revenue Act of 1926 would attach to completed transactions consequences very unfavorable to the transferees which they could not have foreseen or contemplated when the transactions were consummated, and would also deprive transferees of very substantial rights. This is shown by a brief comparison of the respective methods of enforcement of transferee liability available to the United States before and after the enactment of the Revenue Act of 1926.

Prior to the enactment of the Revenue Act of 1926, the liability of a transferee of a taxpayer's assets to the Government was usually determined and enforced in a suit in equity on a creditor's bill. See *Capps Manufacturing Co.* v. *United States*, 15 F. (2d) 528 (C. C. A., 5th Circ.); *McWilliams* v. *Excelsior Coal Co.*, 298 Fed. 884 (C. C. A., 8th Circ.). See also 3 STORY'S EQUITY JURISPRUDENCE, 14 ed., §1660. Under the Revenue Act of 1926, such liability is determined and enforced as is a tax. See REVENUE ACT OF 1926, §§280, 274 (44 Stat. 61, 55). The Commissioner of Internal Revenue asserts the liability. If the transferee appeals to the Board of Tax Appeals, his liability

is determined by "an independent agency in the executive branch of the Government". See REVENUE ACT OF 1924, §900 (k) (43 Stat. 338); REVENUE ACT OF 1926, §900 (44 Stat. 105). The Board has no equitable power and the only parties are the Commissioner and the petitioner. See dissenting opinion of Milliken, Member, in *Cappellini* v. *Commissioner*, 14 B. T. A. 1269, 1286, 1288. There is an appeal to a Circuit Court of Appeals from a decision of the Board, but the Board's determination of questions of fact has the same weight as a verdict of a jury on a writ of error. See REVENUE ACT OF 1926, §1003 (44 Stat. 110). See *Avery* v. *Commissioner*, 22 F. (2d) 6 (C. C. A., 5th Circ.). If the transferee does not appeal to the Board, an assessment may be made against him and his property may be distrained without a hearing. See REV. STAT. §§3187-3209, 26 U. S. C. A. §§116-138. If his property is distrained, or if he pays the tax, the transferee can get relief only by instituting a court action, in which he will have the burden of proving that he is not liable as a transferee. Until changed by Section 602 of the Revenue Act of 1928 (45 Stat. 872), this burden rested upon the transferee in the Board of Tax Appeals also. See BOARD OF TAX APPEALS RULE 30.

The changes effected by Section 280 of the Revenue Act of 1926, deprived the transferee of an antecedent transfer of

(1) A determination of his alleged liability in a *judicial* proceeding as a condition precedent to the taking of his property to satisfy it;

(2) The right to bring his co-transferees into the proceeding by cross-bill and get an adjudication of rights be-

tween himself and them such as the right of contribution. (See 5 POMEROY'S EQUITY JURISPRUDENCE, 2 ed., §2332; *Boss v. United States*, 290 Fed. 167; *United States* v. *Snook*, 24 F. (2d) 844, 845; Equity Rule *XXXVII*);

(3) The right to have the principal debtor brought into the proceeding and get an adjudication of rights between himself and such debtor (*First National Bank* v. *Shuler*, 153 N. Y. 163; 5 POMEROY'S EQUITY JURISPRUDENCE, 2 ed., §2314; Equity Rule *XXXVII*);

(4) The right to have other creditors brought into the proceeding so that he will not have to pay twice (See *National Tradesmen's Bank* v. *Wetmore*, 124 N. Y. 241; 5 POMEROY'S EQUITY JURISPRUDENCE, 2 ed., §2314; Equity Rule *XXXVII*);

(5) The right to other equitable relief, such as marshalling of assets, accounting and cancellation of instruments; and

(6) Freedom from the burden of proof (*United States* v. *Lam*, 26 F. (2d) 830).

A statute which, if retroactive, would deprive a person of so many and such substantial rights as those enumerated above is certainly the kind of statute to which this Court denies retroactive application unless it is required by express language.

It is immaterial that some of the changes effected by Section 280 of the Revenue Act of 1926 may be regarded, so far as retrospective, as mere changes of procedure in the enforcement of an existing claim. The rule against retrospective construction has been frequently applied to prevent retroactive application of changes in procedure. In *Russell* v. *United States*, 278 U. S. 181, this Court held

that the provision in Section 278 (d) of the Revenue Act of 1924 (43 Stat. 299), which authorized collection of a tax within six years after assessment, did not apply retrospectively to an assessment made before that Act was passed. The Court said (pp. 187-188):

> "If an assessment made before that date came within the ambit of §278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired. *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, declares—'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.' No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in §278 or otherwhere."

See also *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Railway Co., supra; Farmers' & Mechanics' National Bank* v. *United States*, 11 F. (2d) 348 (C. C. A., 3rd Circ.), and *United States* v. *St. Louis, San Francisco & Texas Railway Co., supra.* In the latter case this Court said (p. 3):

> "That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity and Guaranty Co.* v. *United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435."

If the changes effected by Section 280 with respect to transferee liability are not sufficient to render the section unconstitutional as applied with respect to transfers made before it was passed, they at least raise very grave doubts as to its constitutionality as so applied. (See argument in the following point.) Such doubts make it imperative that the section be given only prospective construction. See *Blodgett* v. *Holden*, 275 U. S. 142, 147-148; *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 220; *United States* v. *Jin Fuey Moy*, 241 U. S. 294, 401. In this respect statutes relating to taxation are no different from others. *Lucas* v. *Alexander*, 279 U. S. 573, 577.

In *Blodgett* v. *Holden, supra*, Mr. Justice Holmes writing a separate opinion, said (pp. 147-148):

> "Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations *the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same.*" (Italics ours.)

There is absolutely no indication in Section 280 of the Revenue Act of 1926 that Congress intended it to apply retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment. Congress expressly stated that the tax (*i. e.*, the liability of the original taxpayer) for which the transferee was made liable might be a tax imposed either by the Revenue Act of 1926

or prior acts. See Subdivisions (a) (1) and (b) (2) of Section 280. But that is an entirely different liability from the liability that is imposed on the transferee. The transferee's liability, if any, arises when the transfer takes place. Not a word or syllable indicates that Congress intended Section 280 to apply where *the transfer* took place before its enactment. Therefore, not only under the foregoing rules of construction must the statute be confined to transfers subsequent to its enactment, but, in addition, the doctrine of *expressio unius est exclusio alterius* precludes any other interpretation.

If Section 280 is given retrospective construction, it will give to completed transfers consequences prejudicial to the transferee which he never contemplated or foresaw, and will unjustly deprive him of several very substantial rights, possibly in violation of the Constitution. Therefore, it should not be construed retrospectively.

POINT II.

If Section 280 of the Revenue Act of 1926 applies retrospectively to a transferee with respect to property of a taxpayer transferred before its enactment, it deprives such a transferee of property without due process of law in violation of the Fifth Amendment.

As has been shown in the preceding point, Section 280 of the Revenue Act of 1926, if retrospective with respect to property transferred before its enactment, deprives a transferee of several very substantial rights. Such rights were vested in a transferee who received a transfer of a taxpayer's assets before the enactment of Section 280. To take away these rights by retroactive legislation de-

prives such a transferee of property without due process of law in violation of the Fifth Amendment. Section 280 is no less inconsistent with the requirements of due process than a statute taxing transfers made before its enactment. Such a retrospective taxing statute has recently been held unconstitutional by this Court. *Untermyer* v. *Anderson*, 276 U. S. 440. See also *Nichols* v. *Coolidge*, 274 U. S. 531 and *Blodgett* v. *Holden, supra.*

The recent case of *Graham* v. *Goodcell*, 282 U. S. 409, in which this Court held that Section 611 of the Revenue Act of 1928 (45 Stat. 875), although retrospective, does not violate the due process clause of the Fifth Amendment, is not inconsistent with the argument here made. The question in that case was whether Section 611 was constitutional in so far as it excepted from the operation of Section 607 of the same Act, which gives the right to a refund of taxes paid after the expiration of the applicable period of limitations, cases in which the tax was seasonably assessed, a claim in abatement filed, collection stayed and the tax paid before or within one year after the enactment of the Act. The ground of the decision, as is clearly shown in the opinion of Chief Justice Hughes, was that the provision was for the purpose of correcting a mistake on the part of the Treasury Department in believing that the statute of limitations did not apply to distraint proceedings to collect a tax. The holding is merely to the effect that the Constitution does not prevent the Legislature from curing a defect or mistake in administration simply because the effect may be to destroy rights which would otherwise exist.

If Section 280 of the Revenue Act of 1926 is retrospective, it is unconstitutional in its application to a transferee with respect to assets transferred before its enactment.

CONCLUSION.

South Penn Oil Company as *amicus curiae* respectfully submits that the judgment in this case should be reversed, and requests that if it is affirmed this Court expressly reserve for future consideration the contentions presented in this brief.

Respectfully submitted,

OSCAR R. EWING,
Counsel for South Penn Oil Company as *Amicus Curiae*.

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No. 455

In the Supreme Court of the United States

April Term, 1931.

ANNIE G. PHILLIPS, *ET AL.*, *Petitioners*,

vs.

COMMISSIONER OF INTERNAL REVENUE.

MOTION OF JAMES C. DENTON AND RICHARD H. WILLS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*, AND BRIEF OF *AMICI CURIAE*.

JAMES C. DENTON,
RICHARD H. WILLS,
Counsel for Mid-Continent Petroleum Corporation, a Corporation, as Amici Curiae.

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ANNIE G. PHILLIPS, *ET AL.*, *Petitioners*,

vs.

COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

May It Please the Court:

The undersigned, as counsel for Mid-Continent Petroleum Corporation, a corporation, respectfully move this Honorable Court for leave to file the accompanying brief in this case, as *Amici Curiae*.

JAMES C. DENTON,
RICHARD H. WILLS,
Counsel for Mid-Continent Petroleum Corporation, a Corporation, as Amici Curiae.

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ANNIE G. PHILLIPS, *ET AL., Petitioners,*

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COMMISSIONER OF INTERNAL REVENUE.

BRIEF OF JAMES C. DENTON AND RICHARD H. WILLS, AS *AMICI CURIAE*.

I.

Preliminary Statement.

The principal question involved in the above entitled cause is whether section 280 of the Revenue Act of 1926 (26 U. S. C. A., Sec. 1069) is constitutional, and the *amici curiae* are particularly interested in the aforesaid question by reason of their being attorneys for the appellee in cause No. 143 in the United States Circuit Court of Appeals for the Tenth Circuit, wherein A. C. Alexander and A. C. Alexander, as Collector of Internal Revenue for the United

States for the District of Oklahoma, is appellant, and Mid-Continent Petroleum Corporation, a corporation, is appellee; and in which said cause No. 143 the aforesaid question, to-wit, the constitutionality of section 280 of the Revenue Act of 1926, is the principal question before the Court. The aforesaid cause No. 143 was commenced in the United States District Court for the Western District of Oklahoma, and on June 15, 1929, said District Court rendered an opinion holding that the aforesaid section 280 of the Revenue Act of 1926 was unconstitutional, which said opinion is reported in 35 Fed. (2d) 43. Thereafter an appeal was prosecuted in said cause to the Tenth Circuit Court of Appeals, and on the 4th day of February, 1930, said appeal was submitted to said Circuit Court of Appeals upon oral arguments and printed briefs. To this date, however, no disposition has been made of the aforesaid appeal, which *amici curiae* believe is attributable to the pendency of the case at bar, the disposition and determination of which will determine and govern the Tenth Circuit Court of Appeals in its disposition of the aforesaid appeal.

II.

ARGUMENT.

Summary of Argument.

The following is a summary of the argument which will hereinafter be presented:

Point A: Section 280 of the Revenue Act of 1926 has repeatedly been held invalid.

Point B: The rights of the government, without the aforesaid section 280, are amply protected.

Point C: The specific constitutional objections to the aforesaid section 280 are:

(1) The aforesaid section 280 is in violation of Constitution, Art. 3, Sec. 1, vesting all judicial powers in the courts, and Sec. 2, providing that the judicial power shall extend to all cases in law and equity and to controversies to which the United States shall be a party.

(2) The aforesaid section 280 is in violation of Constitution, Amend. 5, requiring due process of law.

(3) The aforesaid section 280 is in violation of Constitution, Amend. 7, guaranteeing the right of trial by jury in suits at common law.

(4) The aforesaid section 280 is bad for uncertainty.

(5) If the aforesaid section 280 be regarded as authorizing a tax, then it is in violation of Constitution, Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned, and not within Amend. 16, authorizing income taxes without apportionment.

Point D: The government's cases distinguished.

Point E: Criticism of the opinion in the case of *Routzahn* v. *Tyroler*.

Point F: Criticism of the opinion of the Circuit Court of Appeals in the case at bar.

Point G: The *Old Colony* case is not in point.

Point A.

Section 280 of the Revenue Act of 1926 Has Repeatedly Been Held Invalid.

Aside from the case at bar and the case of *Routzahn* v. *Tyroler*, 36 Fed. (2d) 208, no court has affirmed the constitutionality of section 280 of the Revenue Act of 1926, which attempts to vest in the Commissioner of Internal Revenue the jurisdiction and power to determine and assess the "liability at law or in equity," if any, of a transferee of property of a taxpayer in respect of the tax imposed upon the taxpayer by the Revenue Acts. And in those cases, which we will later discuss at length, the statute was tested by only the 5th Amendment. On the other hand, the section has been held unconstitutional, or the opinion that it is unconstitutional pretty clearly expressed, in the following cases:

Owensboro Ditcher & Grader Co. v. *Lucas*, 18 Fed. (2d) 798;

Felland v. *Wilkinson*, 33 Fed. (2d) 961;

Mid-Continent Petroleum Corp. v. *Alexander*, 35 Fed. (2d) 43;

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Tyroler v. *Routzahn*, Northern Dist. Ohio, not reported;

Cappellini Case, 14 B. T. A. 1269 (certain opinions in).

Moreover, the statute's invalidity has been tacitly admitted by the government in numerous ways: *(1)* By the

voluntary dismissal of the government's appeal in the *Owensboro* case, *supra; (2)* by Congress' insertion of section 604 in the Revenue Act of 1928, which is an indirect, though futile, attempt to enable the Commissioner of Internal Revenue to enforce section 280, regardless of its unconstitutionality and the decisions of the court to that effect; and, *(3)* by the opinion of the Board of Tax Appeals in the *Capellini* case, 14 B. T. A. 1269.

Point B.

The Rights of the Government, Without the Aforesaid Section 280, Are Amply Protected.

Omitting said sections 280 and 604, the federal law gives the government ample protection in the collection of taxes. If any person liable to pay any tax neglects or refuses to pay the same *after demand*, the amount shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person; U. S. C. A., Title 26, Sec. 115, subdivision *(a)*; but said lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice thereof has been filed by the collector in accordance with the law of the state or territory in which the property subject to lien is situated, or in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated. U. S. C. A., Title 26, Sec. 115, subdivision *(b)*. And the failure of the government, through its administrative or executive branch, to collect its tax from the taxpayer or to avail itself of such statutory

lien on the taxpayer's property does not always leave the government without other remedies. Thus, through the judicial branch, the government, as a creditor, may, under the proper state of facts, enforce in the courts its claim against transferees or purchasers of the taxpayer, or rather against the property of the taxpayer in the possession of such transferee or purchaser, by a creditor's bill or suit for fraudulent conveyance. But such proceedings are suits at law or in equity within the meaning of Constitution, article 3, and are denominated judicial as distinguished from administrative or executive proceedings.

—*United States* v. *Fairall*, 16 Fed. (2d) 328;
Capps Mfg. Co. v. *United States*, 15 Fed. (2d) 528;
Updike v. *United States*, 8 Fed. (2d) 913.

The question of liability at law or in equity of transferees of a taxpayer is treated at length in Klein's Federal Income Taxation, ch. 43, and in an article in 27 Michigan Law Review, p. 39; and such suits at law or in equity which are judicial proceedings, together with the administrative proceedings authorized against the taxpayer above referred to, have always been regarded as sufficient to protect fully the government's rights and interests.

We wish to emphasize by restatement: That said cases at law and equity b r o u g h t by the government against transferees of the taxpayer are strictly judicial proceedings, to which the judicial power of the United States is made to extend by virtue of the Constitution, Art. 3, Sec. 2; that the determination of such cases involves the exercise of the judicial power as distinguished from the legisla-

tive or the executive power of the government; and that the judicial power is, by section 1 of article 3 of the United States Constitution, expressly vested in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish; and that section 280 of the Revenue Act of 1926 is the first attempt on the part of Congress to do these two things: *(a)* To withdraw from the inferior courts ordained and established by Congress, the jurisdiction and power to determine such cases and controversies (which, for sake of argument, we admit can be done); and *(b)* at the same time to vest in or transfer to the administrative or executive branch of the government the judicial power to hear and determine such cases and controversies, which we say violates section 1 of article 3 of the United States Constitution; or, to put it differently, Congress, by section 280, has attempted to say that the judicial power shall *not* extend to all cases in law and equity and to controversies to which the United States shall be a party (which violates the Const., Art. 3, Sec. 1), but also, which is the chief constitutional vice of section 280, that the executive or administrative branch of the government shall exercise the judicial power, to hear and determine such cases and controversies (which is in contravention of the Const., Art. 3, section 2).

Without discussing the wisdom of the federal Constitution, which distributes and divides the powers of the government into three separate branches, the legislative, the executive and the judicial, it will be the purpose of this brief to show that although Congress has power under the

Constitution to create and define the jurisdiction of inferior federal courts, it cannot, as section 280 attempts to do, say that the judicial power shall *not* extend to all cases in law and equity, and controversies to which the United States is a party; nor can it vest in or transfer to the executive or administrative branch of the government and upon a subordinate officer thereof, here the Commissioner of Internal Revenue, the judicial power to hear and determine such cases and controversies.

Point C.

The Specific Constitutional Objections to Section 280.

We assert that section 280 is unconstitutional for the following reasons:

(1) That it is in violation of Const., Art. 3, Sec. 1, vesting the judicial power in the courts, and Sec. 2, providing that the judicial power shall extend to all cases in law and equity, and to controversies to which the United States shall be a party.

(2) That it is in violation of Const., Amend. 5, requiring due process of law.

(3) That it is in violation of Const., Amend. 7, guaranteeing the right of trial by jury in suits at common law.

(4) That it is so vague and uncertain as to be in violation of the Constitution.

(5) That if it be regarded as authorizing the assessment of a tax, it is in violation of Const., Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned, and is not within Const., Amend. 16, authorizing income taxes, since the liability at law or in equity of a transferee is not a liability based on the income of the transferee.

We will now discuss the foregoing objections in the order set out.

Section 280 of the Revenue Act of 1926 is in violation of Const., Art. 3, Sec. 1, vesting all judicial powers in the courts, and Sec. 2, providing that the judicial power shall extend to all cases in law and equity and to controversies to which the United States shall be a party.

Section 1 of article 3 of the Constitution provides:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *"

Section 2 thereof provides:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies to which the United States shall be a party; * * *."

The pertinent part of section 280 of the Revenue Act of 1926 reads as follows:

"The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitation as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds).

"*(1)* The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed upon the taxpayer by this title, or by any prior income, excess profits or wars profits tax act."

Sometimes it helps to reveal the true nature of a formula of language to state the same thing in a different way. Accordingly, let us put section 280 in another form, using the "whereas" formula in early English statutes. That will give more clearly the mandate of the statute and its revolutionary purpose as revealed in the report of the Conference Committee of the House and Senate, and the report of the Joint Committee on Internal Revenue Taxation. (See appendix hereto.)

Whereas, it has always been the practice heretofore to enforce the liability of a transferee of the property of a taxpayer by suit at law or in equity, and the practice is annoying to the Department by reason of its requirements of pleadings, jury trials in some cases, and the other safeguards imposed by judicial proceedings in the courts, therefore,

Be it Enacted: That the Commissioner of Internal Revenue, whenever he thinks a transferee of property of a taxpayer is subject to some liability in law or in equity, may determine said liability in any manner he sees fit, or according to such regulations as he desires, and assess said liability so determined against said transferee.

Perhaps we are too generous to the government in putting the statute in this form. There is nothing in the

statute as written which requires the Commissioner to believe even that the liability is a true one, or that requires any regulations or procedure of any kind to determine the liability. As far as the words of the statute go the assessment may be entirely arbitrary.

If this statute be valid it is difficult to see any occasion whatsoever for trial courts. If Congress can transfer the exercise of judicial power, which it says in its Conference Committee Report has always been exercised by the judicial branch of the government in cases at law or in equity, to an administrative officer, why not transfer jurisdiction of all judicial matters to administrative officers, and do away with the expense of trial courts entirely?

Let us see for a moment the nature of the jurisdiction attempted to be conferred on the Commissioner, which: "Prior to the 1926 Act * * * was by a suit at law or in equity." (Joint Committee Report, appendix hereto.)

We leave out of view the situation where the property was subject to a lien for the taxes before the transfer, since we understand there is no claim of lien in this case. So also we might omit any reference to the liability of a transferee who had contracted to pay the taxes, since we understand there is no claim of contract in this case. But in such a case the action would be at law and the transferee would be entitled to a jury. The government would have the burden of establishing the contract and of proving the debt for taxes, which burden, by the amendment of the 1928 Revenue Act, is attempted to be imposed on the transferee. And this situation is interesting in showing in opposition to the con-

tention of the government, that the transferee's liability is not a tax. It is well settled law that if a corporation commits a tort, and then transfers its property to another corporation that assumes to pay all its obligations, the liability of the later corporation is not in tort at all, but wholly on contract.

—*Trena* v. *Chicago, etc., Ry. Co.*, 228 Fed. 824;
Roberts v. *Underwood Typewriting Co.*, 257 Fed. 583;
Mecke v. *Valleytown Mineral Co.*, 93 Fed. 697.

But let us take the precise situation which we understand is involved in the instant case, where the taxpayer transferred property not subject to lien, and where there was no contract to assume the tranferor's liability. As the Joint Committee says, before the attempted invasion of the province of the judiciary, by section 280, it presented a matter wholly for the courts. What was the nature of the proceedings? Let us outline:

(1) It was a suit in equity, based on fraudulent conveyance and the trust fund doctrine.

(2) The venue was in the district of defendant's residence, and not a Washington city office.

(3) The government had the burden of proving

(a) The amount of its tax debt against the transferror;

(b) The value of the property received by the transferee;

(c) That the transferee took with notice of the tax claim.

(4) If there were other transferees, or interested parties, they could be brought in and proportionate liabilities determined.

(5) The decree would not be measured by the amount of the transferor's tax, but by the value of the property fraudulently received by the transferee, and if there were several transferees taking with notice, the liability would be apportioned between them.

(6) If dissatisfied with the decree, the transferee would have an appeal to a court, not a departmental board.

(7) And would have the record of the trial court, not a vague uncertainty, upon which to base the appeal.

(8) The jurisdiction of the appeal would be in a nearby court, and not in a departmental board thousands of miles away.

If the proceedings of this character, which as the Joint Committee says, have always been for the courts, can be transferred to an administrative officer, *then there is nothing in the way of giving to such officers the jurisdiction of all lawsuits. Can anyone imagine any proceedings more distinctly judicial in character than a creditor's suit? They do not exist.*

Can anyone believe that this statute is valid? And very certainly *it cannot be held valid unless we are willing to send to the dump heap one of the most basic of the principles of constitutional government and of our constitutional law.*

We refer, of course, to the principle that the powers of government are divided into three departments, the executive, the legislative and the judicial. This division of governmental powers lies at the foundation of the government, represents a tradition of good government older than the United States, and has always been regarded by this Court and all other courts as a basic principle of constitutional government.

This Court has gone much further than that in limiting the other departments of government in the attempted exercise of judicial authority. The case of *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. ed. 377, is an example. There, the House of Representatives, because the United States was a creditor of the bankrupt firm of Jay, Cooke & Company (whose affairs were then being administered in bankruptcy), and because it was conceived that an investigation into "the real estate pool" in the District of Columbia, in which said firm was supposed to have an interest, should be made, authorized a committee to inquire into the nature and history of the pool and other related matters. Kilbourn was called to testify before that Committee. He refused and was eventually sentenced by the House to imprisonment for contempt. He brought this suit against the sergeant-at-arms and others to recover damages for his wrongful imprisonment.

The Court, in upholding his claim, first referred to the division of powers among the three departments of government and the importance of not permitting "the persons entrusted with power in any one of these branches * * * to

encroach upon the powers confided to the others"; and further said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.
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> "We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which the committee was directed to make, was one that was judicial in its character and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it is not legislative."

Here the Court went much further than a holding that no other department could adjudicate upon and enforce rights properly determinable in a court. The holding was

that no other department could exercise the power requisite to an investigation, without adjudication and enforcement, into such matters. To the same effect is *In re Pacific Railway Commission*, 32 Fed. 241, decided by the Circuit Court of California with Mr. Justice FIELD sitting. The liability of a debtor, even to the United States, cannot be established and enforced by legislative act. It requires a judicial determination.

In the case of *Myers* v. *United States*, 52 S. C. Rep. 295, 272 U. S. 118, 71 L. ed. 166, the Court, referring to the Union before the creation of the states, said:

> "Their union under the Confederation had not worked well, as the members of the convention knew. Montisquein's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had their full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56. *Kendall* v. *U. S.*, 12 Pet. 524, 610, 9 L. ed. 1181, 1215. Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this court in *Meriwether* v. *Garret*, 102 U. S. 472, 515, 26 L. ed. 197, 205; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, 26 L. ed. 377, 386; *Mug-*

ler v. *Kansas*, 123 U. S. 623, 662, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273."

We do not contend, of course, that the division of the powers of government are so absolute that inquiries that partake of the nature of judicial inquiries cannot be exercised by the administrative part of the government. Government could not well go on unless the executive branch had the power in the first instance to determine facts and apply law much in the same manner as courts determine facts and apply law especially as to matters falling within the governmental function and committed to the executive branch by the Constitution. And in a great number of cases this Court has held that powers of such a character could be conferred upon administrative officers, although, of course, there must be some method of judicial review provided.

But notice this: In every case of this character, the determination of facts and the application of law permitted to be exercised by administrative officers has been *incident to proceedings distinctly administrative in character*, such as the levy and collection of taxes, the exclusion of aliens and the like. And the judicial questions were in every case directly connected with the administrative duty. As will be seen hereafter, a judicial inquiry which is collateral to and not an essential part of the administrative duty, is not for the executive department of the government.

Very certainly this Court has never attempted a judicial repeal of Constitution, article 3, section 1, vesting the judicial power in the courts. The fact that the courts have

exclusive judicial power is just as strongly entrenched today as a sound political principle and a settled doctrine of constitutional law as it ever has been.

My liability as the transferee of your property, due to your failure to pay your taxes, has nothing whatever to do with taxation. The rights of the government under such circumstances are precisely the same as if you were a judgment debtor of the government on a promissory note, for a tort or what not. As Judge DAWSON said in the pioneer case of *Owensboro Ditcher & Grader Co. v. Lucas*, 18 Fed. (2d) 708, the government "occupies the same position as any other pursuing creditor, and its rights are worked out upon the same legal and equitable principles as obtain in cases of other general creditors, and not under the tax statute which determines the primary liability of the taxpayer."

Since no one up to this good hour has ever had the temerity to question the soundness of Judge DAWSON's conclusions and reasoning in the *Owensboro* case, and since even the Department recognized its validity by dismissing its appeal, and attempted to avoid the effect of the decision by procuring the enactment of the futile and abortive section 604 of the Revenue Act of 1928, we will quote at length from the opinion:

> "The legislative department has the undoubted right to levy a tax, and commit to a nonjudicial body the duty of assessment and collection, and if, at any stage of the procedure, the taxpayer is given the right to be heard by the authority charged with the assessment and collection thereof, he has not been denied due process of law. The plaintiff's liability, however, if

any, which the defendant, under section 280, is seeking to enforce, does not grow out of nor flow from any of the provisions of the Revenue Act of 1926, nor from any other statute of the United States. The Revenue Act of 1926 undertakes in no way to define the measure of the liability of the transferee of the property to a taxpayer, or to lay down any rule by which it may be determined. No revenue statute, so far as the court is advised, has ever undertaken so to do. So far as the court is advised, the liability of one who has had transferred to him the assets of a taxpayer before the government lien attached has always been worked out under general legal and equitable principles, or as the result of some local rule of property in the jurisdiction where the transferred property is located. The Revenue Act of 1926, insofar as measuring this liability is concerned, is no departure from what has been the general practice in the past. The Act of 1926 simply recognizes that in given cases this liability, under settled principles of law and equity, and sometimes under local rules of property, exists, and it undertakes to leave to the Commissioners to determine in each case if such liability does exist, and, if so, to fix the extent thereof and to enforce its collection.

"In considering this question it is well to remember that the taxes sought to be collected in this case are personal obligations of the taxpayer, directed against the taxpayer, and not against his property. Under section 115, title 26, U. S. C. (Revised Statutes, Sec. 3186; Comp. St., Sec. 4908), the government, as against the taxpayer, has no lien upon his property except from the time the assessment list is received by the collector in the office of the clerk of the District Court in the district within which the property subject to such lien is situated, and in the office of the proper clerk or recorder of deeds. Therefore, in those cases where

the government is seeking to recover taxes due by a taxpayer from a purchaser of his property, who became such before the attaching of the lien, it occupies the same position as any other pursuing creditor, and its rights are worked out upon the same legal and equitable principles as obtain in cases of other general creditors, and not under the tax statute which determines the primary liability of the taxpayer.

"Prior to the enactment of section 280 of the Revenue Act of 1926, these rights had always been determined by the judicial department, and not by the executive department. The extent and nature of the power attempted to be conferred upon the Commissioner by section 280 of the act in question, and the radical departure from the settled practice in such cases which would be brought about by the application of this section, perhaps can be best illustrated by enumerating some of the instances in which in the past it has been held that the transferee of the property of a debtor may be held liable for the debts of him from whom the property was received, and by an examination of the method by which this liability has always been determined and enforced.

"If A. transfers property to B., under a contract by which B. agrees to pay certain debts of A., the holders of these debts could bring an action at law against B. on his contract as one made for their benefit. Such legal liability, however, it has always been understood, could only be enforced in a suit in a court of competent jurisdiction, and in such suit B. could certainly plead any defense personal to himself, such as *non est factum*, offset, counterclaim, etc., and on these defenses, under the settled practice, he has always been entitled to a judicial hearing, with trial by jury, where the amount exceeded $20.

"If a corporation distributes its property to its stockholders, without paying its debts, in a suit in equity brought for that purpose, a stockholder could be made to answer for these debts to the extent of the value of the corporate assets received by him, and in such suit, before the stockholders' property could be subject to the payment of the corporate debts, he has always been entitled to his day in court, and a hearing upon such questions, as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, whether he received any of the assets of the corporation, the value thereof when received, and other defenses personal to himself. *Coe* v. *Armour Fert. Works,* 237 U. S. 413, 35 Sup. Ct. 625, 59 L. ed. 1027; *Great Western Telegraph Co.* v. *Purdy,* 116 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986; *Bernheimer* v. *Converse,* 206 U. S. 516, 27 S. Ct. 755, 51 L. ed. 1163; *Converse* v. *Hamilton,* 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749, Ann. Cas. 1913-D, 1292.

"Again, in case A. transfers his property to B. without consideration, B. could be held liable in a proper judicial proceeding for the debts of A. existing at the time of the transfer, to the extent of the property received by him, upon the theory of implied contract; but certainly B. has always been entitled to have judicially determined the validity of the debt, whether the transfer was without consideration, the value of the property transferred, and to interpose and have judicially determined other pertinent defenses.

"Liabilities such as those herein enumerated are the liabilities referred to in section 280, and heretofore have always been enforced by judicial proceedings. The matters involved are essentially judicial in character, and Congress is without power to withdraw them from judicial cognizance and confer them upon the executive department and the attempt in section 280 so to do

amounts not only to a denial of due process of law, but also is violative of section 1 of article 3 of the Constitution, which vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish."

With all the emphasis that it is possible to give to words, we assert that if a proceeding to enforce the liability of a transferee to pay the debt of the transferor is not within the judicial power given exclusively to the courts, then there is no such power, and the courts, instead of being one of three independent departments of government, is an inferior department, wholly subordinated to the legislative and executive departments.

Very certainly neither this Court nor any other American court, is going to assent to the proposition that Constitution, article 3, section 1, is meaningless, and that the judiciary is utterly, wholly and hopelessly subordinate to the other two of the three supposedly separate and independent branches of the government. And if the Court is not willing to admit the utter subordination of the judiciary to the other departments, then there is no possible way to regard section 280 as anything less than an attempted invasion of the province of the judiciary. *Let us be emphatic in asserting that it is impossible to imagine proceedings any more distinctly judicial in character than proceedings to hold a transferee liable for the debts of the transferor.*

If so, what? We submit that not a single controversy will remain for the operation of judicial power, if this proceeding is not of that character.

For this proceeding is nothing more than a lawsuit, and has always been regarded as judicial in character. And if there are few cases to be cited, the answer is plain. *Never before has the Congress attempted to take from the courts the jurisdiction over a simple, plain, ordinary and always recognized lawsuit, and to give that jurisdiction to an administrative officer.*

But it may be said that the government is interested in a fiscal way and that that makes a difference. But the government has exactly the same fiscal interest when it takes property by eminent domain for public use, in the compensation to be paid, and yet it is definitely settled law that the determination of the amount of compensation is exclusively for the courts and cannot be conferred upon an executive officer.

United States v. *New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014, involved a war-time statute under which the government took coal and attempted to fix the price, acting through the navy department. Denying its right to so fix the price, the Court said "the ascertainment of compensation is a judicial function and no power exists in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard."

Monongahela Nav. Co. v. *United States*, 148 U. S. 312, 37 L. ed. 463, involved an eminent domain statute which provided "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated." This part of the

statute was held invalid on the ground that the amount of compensation to be paid upon an eminent domain taking presented a judicial question. The Court, after saying that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government," continues as follows a little further on in the opinion:

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The public purposes—that is a question of a political and legislative character; but when taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.*, 36 U. S. 11 Pet. 420, 571 (9:773,833), Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college in behalf of the old one a hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constutionally do: assess the amount of compensation to which the complainants are entitled.' See, also, the following authorities: *Com.* v. *Pittsburgh & C. R. Co.*, 58 Pa. 26, 50; *Pennsylvania R. Co.* v. *Baltimore & O. R.*

Co., 60 Md. 263; *Isom* v. *Mississippi Cent. R. Co.*, 36 Miss. 300.

"In the last of these cases and on page 315, will be found these observations of the court: 'The right of the legislature of the state, by law, to apply the property of the citizen to public use, and then to constitute itself the judge in its own case to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen thus taking his property without his consent or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so'."

In determining whether a statute attempting to grant judicial power to an administrative officer is invalid as an invasion of the province of the judiciary, there is a fundamental difference between a grant of quasi judicial powers forming a part of proceedings distinctly and administrative in character and an attempted grant of strictly judicial powers.

This distinction, though not often distinctly drawn by the writers as fundamental, is clearly developed by this Court in cases to be considered, and is of the utmost importance. Where the power of determining the facts and applying the law is an integral part of the proceedings which are clearly administrative, then their exercise is not an invasion of the province of the judiciary. All that is required by

the Constitution in such case is the providing in some manner for a judicial review or supervision. And this judicial examination may be much more limited in character than the original hearing. Thus the determination by the administrative branch of the government may be made presumptively correct, or even conclusive, and the courts can go no further than to determine *(1)* if there was a denial of fair hearing, *(2)* if there was any evidence whatever to support the conclusion of fact, and, *(3)* to determine if there was the application of an erroneous rule of law. It is the application of this limited scope of review which lies at the bottom of the holdings that on appeals by a taxpayer the reviewing tribunal will only review questions of law and not pass on the sufficiency of the evidence.

—*Ox Fibre Brush Co.* v. *Blair,* 32 Fed. (2d) 42.

The law is entirely different when the matter involved is strictly judicial as in the instant case. The distinction is clearly developed in *NG Fung Ho* v. *White,* 259 U. S. 276, 66 L. ed. 938, the last of a series of decisions which we will now consider, *first,* in showing that administration proceedings, even with right of review, do not give the protection offered by judicial proceedings, and, *second,* that where the question is from its nature and character essentially judicial, the question is wholly for the courts from the first.

This Court has forcibly indicated its opinion that administrative proceedings do not furnish the protection to individual rights that is given by judicial proceedings.

In *United States* v. *Woo Jan,* 245 U. S. 552, 62 L. ed. 466, a Chinese exclusion case, involving an administrative

right given by statute to deport Chinese aliens, the Court calls attention to the difference between administrative and judicial action, and says:

> "The government recognized that the difference—we might say contrast—is the step on which it 'must fall down, or else o'erleap.' And necessarily so. Manifestly the remedy of section 21 has not the safeguards of impartiality and providence that the remedy of the Exclusion Laws has. Mere discretion prompts the first and last act of the former; the latter has the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions."

In *White* v. *Chin Fong*, 253 U. S. 90, 64 L. ed. 797, a similar case, the Court speaks of a judicial investigation "with its assurances and sanctions as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in the executive action."

And in *NG Fung Ho* v. *White*, 259 U. S. 276, 66 L. ed. 938, the Court speaks against the danger of deportation "without the sanction afforded by judicial proceedings," and speaks of the "difference in security of judicial over administrative action."

These deportation cases are conclusive upon the proposition *that where the controversy is at its inception a judicial one, then due process of law is not satisfied by reason of the existence of some method of judicial review, but the administrative officers are wholly without jurisdiction in the premises.* These cases are very sharply in point and present a situation much more extreme than the instant case, since

there is not the least doubt of the right of Congress to make any provisions it sees fit for the exclusion of aliens and for the deportation through executive action of aliens wrongfully entering the country. This is the general rule, but the situation may be such as to involve a judicial question, and in this case the Department is without any jurisdiction to act in the first instance.

In *United States* v. *Woo Jan*, 245 U. S. 552, 62 L. ed. 466, the Secretary of Labor attempted to exercise the power supposed to be conferred upon him by causing the arrest of Woo Jan as a Chinese alien, with the view and purpose of deporting him. Woo Jan was arrested and petitioned the District Court in *habeas corpus* to be discharged from arrest, asserting his right to be and remain in the United States and setting up as grounds for it that he was a merchant and that his status as a resident has been investigated by the authorities of the United States and established and that there was no authority of law for the issuance of the warrant.

The question of the right of the Secretary of Labor to proceed administratively was presented to this Court by certified questions, and it was held that the question presented was a judicial one, that there was no jurisdiction to deport through administrative action, and that Woo Jan was entitled to discharge by *habeas corpus*.

While it may be claimed that the above case turned on the question of the statute involved, rather than the limitations upon the executive power, the same contention can hardly be made as to the decision in *White* v. *Chin Fong*,

253 U. S. 90, 64 L. ed. 797. There the Department attempted to deport a Chinaman claiming the right to re-enter the United States as a returning merchant, on the ground that his original entry was fraudulent. This seemed to bring the case within the Deportation Act (Act Feb. 20, 1907), providing that in case the Secretary of Commerce and Labor should be satisfied that an alien has been found in the United States in violation of this act or that an alien is subject to deportation under the provisions of this act or any law of the United States, he shall cause such alien within a period of three years after landing of entry, to be taken into custody and returned to the country from where he came. But this Court denied the contention of the Department holding that if the Chinaman denied the claim of fraud and asserted that he was rightfully entitled to remain in the United States that the question was a judicial one and the Department without jurisdiction to act administratively. It was held he was entitled to his discharge on *habeas corpus*.

In the case of *NG Fung Ho* v. *White*, 259 U. S. 276, 66 L. ed. 938, the Department arrested and attempted to deport by administrative proceedings a Chinaman who claimed that he was rightfully entitled to remain in the United States. The Chinaman sued out a writ of *habeas corpus*, which writ was quashed and the action of the District Court in quashing the writ affirmed by the Circuit Court of Appeals. The case was taken to this Court. Calling attention to the fact that the petitioners did not merely assert a claim of citizenship, but supported the claim by evidence sufficient, if believed, to entitle them to a find-

ing of citizenship, this Court held that the case presented a judicial question in which the petitioners were entitled to a *de novo* trial in the courts, and that due process of law was not satisfied by a review of the Department's action in the usual manner when the Department acts within its jurisdiction. The Court speaks as follows:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under a military service. It is well settled that in such a case a writ of *habeas corpus* will issue to determine the statute. *Ex parte Reed,* 100 U. S. 13, 25 L. ed. 538; *Re Grimley,* 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54; *Re Morrissey,* 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57; *Johnson* v. *Sayre,* 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773. Compare *Ex parte Crow Dog (Ex parte Kang Gi Shun-Ca),* 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of *habeas corpus* when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then, obviously, deportation of a resident may follow upon a purely executive order, whatever his race or place of birth. For where there is jurisdiction, a finding of fact by the executive department is conclusive *(United States* v. *Ju Toy,* 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644); and courts have no power to interfere unless there was either denial of a fair hearing *(Chin Yow* v. *United States,* 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201), or the finding was not supported by evidence *(American School* v. *McAnnulty,* 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), or there was an applica-

tion of an erroneous rule of law *(Gegiow* v. *Uhl,* 239 U. S. 3, 60 L. ed. 114, 36 Sup. Ct. Rep. 2). To deport one who so claims to be citizen obviously deprives him of liberty, as was pointed out in *Chin Yow* v. *U. S.,* 208 U. S. 8, 13, 52 L.ed. 369, 370, 28 Sup.Ct.Rep. 201. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the 5th Amendment affords protection in its guaranty of due process of law. The difference in security of judicial over administrative action has been adverted to by this court."

The foregoing exclusion cases are conclusive upon the proposition *that where the matter is judicial at its inception, then due process of law is not accorded by an administrative hearing from which an appeal is permitted, since the scope of the appeal is not as broad as the scope of the original hearing.* Thus, if the controversy is original in its inception it is judicial from the very first and it cannot be conferred upon an administrative tribunal, regardless of the fact that provision is made for an appeal.

In *Lew Shee* v. *Nagle;* 7 Fed. (2d) 367 (9 C. C. A.), the syllabus reads as follows:

"Claims of citizenship, supported by competent evidence, by one sought to be deported as an alien, entitles her to a judicial trial, and renders void the department's order of deportation as in excess of its jurisdiction, as it cannot invade the province of the court by declaring the claim frivolous and the testimony in its support unworthy of belief.

"We think the same rule is applicable here. If an order of deportation is supported by competent evi-

dence where the rights of an alien are involved, the court cannot invade the province of the executive department. If, on the other hand, there is a claim of citizenship supported by competent evidence, the executive department cannot i n v a d e the province of the courts. It cannot do so directly, nor can it accomplish the same result indirectly by simply declaring that the claim of citizenship is frivolous and the testimony offered in its support unworthy of belief. In the light of what has been said, without any attempt to review the testimony, it is manifest from a mere inspection of the record before us that there was such a supported claim of citizenship here as to oust the executive department of jurisdiction."

The distinction between judicial matters which cannot be submitted to administrative tribunals and officers, and matters which may be so submitted is developed in the recent case of *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789, relating to the Court of Customs Appeals. The principle is developed that judicial functions cannot be given administrative tribunals or officers, even though "from their nature susceptible of determination by the courts," unless they "admit of legislative or executive determination." In sustaining the Court of Customs Appeals, the Court uses the following suggestive language as to the subjects entrusted to the jurisdiction conferred on certain similar courts: "They all admit of legislative or executive determination, and yet from their nature are susceptible by determination by the courts." "The matters made cognizable therein include nothing which inherently or necessarily require judicial determination." "But its functions, although

mostly *quasi* judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times." "The appeals include nothing which inherently or necessarily require judicial determination, but only matters the determination of which may be, and at times have been, committed exclusively to executive officers."

We submit that the determination of a transferee's liability "inherently" and "necessarily" requires judicial determination. Creditors' suits always have been regarded as strictly judicial, have never been "committed to executive officers," and that, therefore, section 280 violates Constitution, article 3, sections 1 and 2.

Revenue Act 1926, section 280, is in violation of Const., Amend. 5, requiring due process of law.

In *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 Fed. (2d) 798, the court says on this phase of the case:

> "That section 280 of the Revenue Act of 1926, if enforced as the bill alleges is threatened to be done in this case, will result in denying to the plaintiff due process of law within the meaning of the 5th Amendment to the Constitution of the United States, seems too obvious for extended discussion, and in reaching this conclusion I am not unmindful of the rule that taxes, as such, may be assessed against and collected from the taxpayer by an administrative body, without giving the taxpayer any right to resort to the courts prior to the payment of the tax."

No court, excepting the Second Circuit Court of Appeals in the case at bar and the Circuit Court of Appeals

of the Sixth Circuit in *Routzahn* v. *Tyroler*, *supra*, has seen fit to deny this, as will be seen from the cases heretofore cited, in which the statute came up for consideration. Moreover, in respect of the *Routzahn* case, *supra*, it is noteworthy that section 280 was not held unconstitutional specifically, "as against contention that an opportunity to be heard ended with Board of Tax Appeals since transferee has right to have whole matter heard by Circuit Court of Appeals under the Revenue Act of 1926, section 1001." And the Second Circuit Court of Appeals in the case at bar simply followed the *Routzahn* case. But the reasoning of the Court in the *Routzahn* case is plainly fallacious, because a transferee does not have the right to have the whole matter heard by the Circuit Court of Appeals as has been decided by the Third, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeals, respectively, in the following cases:

Bishoff v. *Commissioners of Internal Revenue*, 27 Fed. (2d) 91;

Avery v. *Commissioners of Internal Revenue*, 22 Fed. (2d) 6;

Collin v. *Commissioners of Internal Revenue*, 32 Fed. (2d) 753;

Am-Plus Storage Battery Co. v. *Commissioner of Internal Revenue*, 35 Fed. (2d) 167;

Blair, Commissioner of Internal Revenue, v. *Byers*, 35 Fed. (2d) 326;

Royal Packing Co. v. *Commissioner of Internal Revenue*, 22 Fed. (2d) 536;

Prey Bros. Live Stock Commission Company v. *Internal Revenue Commission*, 36 Fed. (2d) 323.

The fact that the government's claim originated in a tax imposed by a Revenue Act of Congress, and that the tax is collectable from the taxpayer by the executive or administrative branch of the government does not in any way tend to show that proceedings of the government against a transferee of the taxpayer are "tax" proceedings under the Constitution or that such proceedings against a transferee are administrative in character. In principle, this Court has settled this in the eminent domain cases. No one will deny that eminent domain is entirely administrative or may be made so by Congress up to the point of determining the amount of compensation to be paid, and the determination of such compensation is more closely related to the proceedings to condemn than is the liability at law or in equity of a transferee for the taxes of a transferor taxpayer. Yet this Court emphatically denies the right to have compensation in such cases fixed as an administrative matter.

—*United States* v. *New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014;

Monongahela Nav. Co. v. *United States*, 148 U. S. 312, 37 L. ed. 463;

Charles River Bridge v. *Warren Bridge*, 36 U. S. 420, 571, 9 L. ed. 773.

The government will doubtless attempt to sustain section 280 on the theory that the proceedings attempted to be authorized "are proceedings for the collection of a tax." This is incorrect. While the debt owing the government may have originated as a "tax," it is very clear that the government's claim as against the transferee is not a "tax"

claim or case in any true sense of the term. Because neither the Revenue Acts nor section 280 fixes or creates any liability against the transferee as such in respect of the government's claim, whereas, in every "tax" claim, the liability of the taxpayer or party sought to be held liable is fixed and created by Congress under the Revenue Acts, and the Commissioner of Internal Revenue acts merely as an administrative officer in collecting the government's claim as created by Congress. Again in "tax" cases or claims, strictly speaking, the debtor or taxpayer is personally liable to the government for the whole claim; whereas, under claims against transferees, the transferee is not personally liable, unless by virtue of an express or implied contract, which involves a question for judicial determination; and without which a transferee can be held liable if at all only on general, legal or equitable principles enforced by the courts; and then not for the full amount of the government's claim but only for the value of the property of the taxpayer which the transferee has received.

—*United States* v. *McHatton*, 226 Fed. 602;
Updike v. *United States*, 8 Fed. (2d) 913.

Again, it is a rule often recognized by the Department itself that there is no liability of any kind against a *bona fide* transferee.

—O. D. 597, C. B. 3,300;
O. D. 769, C. B. 4,324;
Fostoria Milling & Grain Co., 11 B. T. A. 1401.

The government will probably contend that proceedings under section 280 are "a substitute for bills in equity in

creditors' suits." This is justified by the cases which regarded suits by the government against transferees as being in the nature of creditors' suits and treat "taxes" for the purpose of such suits as debts.

—*United States* v. *McHatton*, 266 Fed. 602;

Owensboro Ditcher & Grader Co. v. *Lucas*, 18 Fed. (2d) 798.

See, also, in reference to trust fund doctrine:

Updike v. *United States*, 8 Fed. (2d) 913.

Suit by the government against the transferee has always been regarded as a creditor's bill, and the law is very well settled that in a creditor's suit the measure of recovery is not the debt due plaintiff from the transferor, *but the value of the property transferred.* It is so held by this Court in *Dunphy* v. *Kleinschmidt*, 11 Wall. 610, 20 L. ed. 223, where, in speaking of the transferee, it says: "He must be called to account for just what property has come into his hands and no more; and he will be entitled under ordinary circumstances to a rebate for the amount that was justly and honestly his due."

And it is to be remembered that while a fraudulent transferee is liable only for the value which he received without paying consideration therefor, as held in the above case, it is not always true, depending upon the facts, that any one creditor of the transferor will receive all the transferee surrenders. All the creditors come in, questions of priority come up, and the liability of the transferee is divided between the creditors of the same class, after deducting pre-

ferred claim. And the fact that the debt of the government had its inception as a debt for taxes does not always make it a preferred claim. For instance it is indicated by the following cases that a debt for taxes is junior to lien claims:

Sherwood v. *United States*, 5 Fed. (2d) 991;
Ormsbee v. *United States*, 23 Fed. (2d) 926.

The situation very clearly indicates that the attempt to confer the function of determining a transferee's liability upon an administrative officer is a denial of due process. The situation is infinitely more complicated and reveals the necessity of the protection to be had only in judicial proceedings much more strongly than the comparatively simple question of compensation in eminent domain proceedings, and yet, as we have seen, this Court holds the latter question to be one exclusively for the judiciary. Moreover, creditors' suits have always been regarded as judicial. No one has ever imagined the contrary. And in all the tax cases we have examined not one shows an attempt to assert a transferee's liability by administrative proceedings.

No doubt a strenuous attempt will be made to fix the action of the Commissioner in his attempt to fix a transferee's liability as the assessment of a tax. But we are unable to see any advantage in artificialties, when the situation is entirely clear. Certainly the asserted debt of the government is for taxes, but it is just as clear that it is not the transferee's taxes. The statute itself does not purport to deal with a taxpayer's liability. In terms the liability is specified as a transferee's liability. And to say that such liability is a tax liability recalls the language of Mr. Justice

Holmes in *Guy* v. *Donald*, 203 U. S. 399, 51 L. ed. 245: "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the ground on which the name was applied."

In *Coffin Bros. & Co.* v. *Bennett*, 277 U. S. 29, 72 L. ed. 768, it was held that a state statute authorizing the State Superintendent of Banks to issue executions against the stockholders of an insolvent bank for the amount of the assessment necessary to meet the claim of creditors, was constitutional and not a denial of due process, but this holding was predicated upon the fact that the statute provided that a stockholder should have the right, by filing an affidavit of illegality, to contest his liability for such assessment and the amount and necessity thereof. Upon the filing of such an affidavit the execution was to be returned to court for trial. The Court sustained the statute because it is said that "the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so-called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors'." Inferentially the case seems to be authority for the proposition that a statute of this kind would be a denial of due process unless it gave a right to a judicial hearing *de novo*.

In *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, a personal injury case, the railroad made the contention that the fact that the whole subject of signals, flagman,

gates, etc., at crossings was regulated by statutes, would relieve it from adopting such other measures as common prudence dictated. The Court denied the contention, saying that "neither the legislature nor railroad commissioner shall arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing in every particular case which may afterward arise."

Coe v. *Armour Fertilizer Co.*, 237 U. S. 413, 59 L. ed. 1027, involved the validity of a state statute which provided that upon the return of an execution against a corporation *nulla bona*, an execution may issue against a stockholder for unpaid subscriptions. It was held that the statute was a denial of due process, the Court saying that "before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled upon the most fundamental principles to a day in court and a hearing upon the questions as to whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." The Court further says that "the suggestion that because, under sections 1624 and 1625, a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues, and before interference with his possession or his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not 'within the class who may justly complain' will not withstand critical analysis."

This Court has many times undertaken in this language or that to define due process. It has succeeded rather admirably in doing so. In *Pennoyer* v. *Neff*, 95 U. S. 714, s. c. 24 L. ed. 565, and in *Endicott-Johnson Corporation* v. *Encyclopedia Press*, 266 U. S. 285, s. c. 69 L. ed. 288, the Court thus defined it:

> "A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

In *Turner* v. *Wade*, 254 U. S. 64, s. c. 65 L. ed. 134, a county board of supervisors in the State of Georgia, under duly conferred statutory authority, raised the assessment of a taxpayer's property without prior notice to him. The Court held that the fact that notice might thereafter have been given to him as under the statute, with a consequent right in him to demand an arbitration, did not afford him "the opportunity to be heard, whether personally, by publication, or by statute fixing the time or place of the hearing," and that the proceeding was, therefore, an unconstitutional deprivation of his property.

But if there be an appeal to the Circuit Courts of Appeal, there is no appeal anywhere provided upon the facts which may underlie the transferee's obligation at law or in equity. The appeals which the framers of the act wrote into it, are appeals solely upon the law of the case. At least it has so been written by the Circuit Court of Appeals of seven circuits. The case of *Avery* v. *Commissioner*, 22 Fed. (2d) 6, by the Circuit Court of Appeals of the First Circuit, is illustrative. In that case the court said:

"It is clear from the wording of the statute that the jurisdiction given to this court is to review only errors of law in a decision of the board."

Where, then, is there in the act judicial process for the transferee as to the facts which may, or may not, impose liability upon him?

But there is another barrier against such an appeal, in that sections 1001 of the 1926 Act and 603 of the 1928 Act forbid even a taxpayer to appeal until he has given bond in double the amount of the liability asserted against him. And if perchance the transferee's worldly circumstances make it impossible for him to give such a bond, he must submit to the Commissioner's will. And there is not much of due process of law about that. This Court has written that there is not. In *Chicago & Northwestern R. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35, s. c. 67 L. ed. 115, Chief Justice TAFT said:

"This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from the vindication of his rights, have been held invalid under the 14th Amendment."

In *Missouri Pacific R. Co.* v. *Tucker*, 230 U. S. 340, s. c. 57 L. od. 1507, it is written:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. * * * A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the condition

upon which it is offered or may be obtained is also unconstitutional."

Not only is a bond required, but on the appeal all the presumptions are in favor of the action of the Commissioner. And the courts hold that there can be no review of the evidence. Thus, we have a proceeding which has always been regarded as a suit for a court, transferred to an administrative officer, with no provision by which the controversy can be determined *de novo* by the court. This is not due process as described in *Twining* v. *New Jersey*, 211 U. S. 78, 53 L. ed. 97, wherein it is said that: "Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and guard him against the arbitrary action of government."

Section 280 of the Revenue Act of 1926 is in violation of the Const., Amend. 7, guaranteeing the right of trial by jury in suits at common law.

Amendment 7 to the Constitution provides as follows:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined by any court of the United States than according to the rules of common law."

The language of section 280 of the Revenue Act of 1926, itself indicates that the liability of a transferee of property of a taxpayer in respect of the tax imposed upon

the taxpayer by the Revenue Acts of Congress, may be one either at law or in equity. As pointed out in the *Owensboro* case, *supra*, the liability of a transferee of a taxpayer is different from the primary liability of the taxpayer, which latter liability is imposed by Congress upon the citizen, subject to the tax; but when the government undertakes to collect this liability against a third party such and as the transferee against whom the tax was not originally assessed, the liability rests upon different considerations or rather upon general, legal and equitable principles. And the liability of a transferee from its very nature and character, is a contractual one, either express or implied; and if the transferee has contracted with the taxpayer to pay his tax, the government's right to proceed against him is at law upon an express or implied contract. In the latter case the 7th Amendment to the Constitution applies with full force and effect, entitles the transferee to a jury trial in the determination of the fact of liability as well as of the amount of the liability.

Without further argument we submit that from the very nature of the liability and from the very language of section 280 itself, the transferee's liability may be one at law, as distinguished from a liability in equity, and that therefore section 280 which attempts to confer jurisdiction on the executive branch of the government to determine this liability without a jury trial, is unconstitutional when measured by the 7th Amendment to the Constitution.

Revenue Act of 1926, section 280, is bad for uncertainty.

We think the decisions involving the Lever Act settle this question. It will be noticed that section 280 is an attempt to confer jurisdiction on the Commissioner, over one of the most complicated of judicial proceedings, without in any manner indicating the procedure to be followed. How such a statute can be regarded as having the requisite certainty is entirely beyond us.

In *United States* v. *Cohen Gro. Co.*, 255 U. S. 81, 65 L. ed. 516, a section of the Lever Act, providing "that it is hereby made unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities, was held in violation of the 5th and 6th Amendments of the United States Constitution for its indefiniteness and uncertainty. In the opinion the Court speaks as follows:

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds

abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject. And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution."

The same conclusion was reached in *Weed & Co.* v. *Lockwood*, 255 U. S. 104, 65 L. ed. 532.

The above cases were criminal and there is language in the opinions holding the statute bad for indefiniteness on the ground of not establishing a criminal standard with sufficient certainty. But it is submitted that the principle holds good in civil cases and in reference to civil statutes.

The validity of the Lever Act again came before this Court in *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 69 L. ed. 589, which was a civil case involving the Lever Act, and where the Court adhered to its former holdings. The Court speaks as follows:

"It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been

so construed and applied by other courts in civil proceedings. *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N.Y. 51, 54, 14 A.L.R. 1054, 131 N. E. 566; *Dunman* v. *South Texas Lumber Co.*, ... Tex. Civ. App. ..., 252 S. W. 274, 275. In the first of these citations, the Court of Appeals of New York, referring to this court's ruling in the *L. Cohen Grocery Co.* case, well said: 'The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. * * * The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationals of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty'."

Yu Cong Eng. v. *Trinidad*, 271 U. S. 500, 70 L. ed. 1059, involved a Philippine statute, which provided that "it shall be unlawful for any person, company or partnership or corporation engaged in commence, industry or any other activity for the purpose of profit in the Philippine Islands in accordance with existing law to keep its account books in any language other than English, Spanish or any local dialect." The statute was to prevent fraud against taxation and was regarded as primarily directed against Chinese merchants. Calling attention to the fact that the language admitted of several different constructions, pointed out in the opinion, the Court held that the statute was in violation of the Constitution and violated the due process clause by

reason of its uncertainty. It is held, as stated, in the Law Edition syllabus, that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law.

If Revenue Act 1926, section 280, be regarded as authorizing a tax, then it is in violation of Const., Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned, and not within Amend. 16, authorizing income taxes without apportionment.

The government's insistence that section 280 is to be regarded as authorizing the assessment of a tax, raises the question of what kind of a tax the government thinks is to be assessed. Very certainly it is not a tax on the income of the party to be assessed. It is equally certain that it is not a tax measured by the income of the original taxpayer, since, as we have seen, a transferee's liability is not measured by the amount of the asserted claim. Maybe it is an excise tax on the privilege of purchasing property from persons who may be indebted to the government for taxes!

It appears to us that the government is face to face with a dilemma. If the statute authorizes the Commissioner to levy a tax, the statute is clearly in violation of Const., Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned among the states. If an assessment of a transferee's liability must be regarded as the assessment of a tax, in order to save its constitutionality, as the government seems to think, then very certainly the statute comes in head on collision with the above constitutional provision since it would clearly be a direct tax, but not an income tax, and

Amendment 16 only relates to income taxes. If the government is right in its contention, it establishes the invalidity of the statute under the doctrine of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. ed. 1108.

Point D.

The Government's Cases Distinguished.

In the case in the Tenth Circuit Court of Appeals in which the writers of this brief are attorneys, the government, in support of its contention that the above referred to section 280 is constitutional, cited a number of cases, and we would like to briefly consider said cases. In said case the government first cited the cases of *United States* v. *Lazenby*, 5 Fed. (2d) 827; *United States* v. *Russell, et al.*, 22 Fed. (2d) 249; same case, 278 U. S. 181; *United States* v. *Updike, et al.*, 25 Fed. (2d) 746; and the same case, 32 Fed. (2d) 1, evidently with the idea that the same sustain the notion that the transferee's liability is a tax liability. These cases, however, merely hold that the statutory limitations of suits to collect taxes apply to suits against a transferee, and it would be a strange thing to think that Congress intended to impose a limitation on suits against a taxpayer without intending a like limitation against the transferee, and the cited cases go no further. They indicate that a suit by the government against the transferee is a suit for taxes, meaning, of course, simply that the end sought is merely the satisfaction of the claim, which had its inception in taxes against the transferor. Thus, *Felland* v. *Wilkinson*, 33 Fed. (2d) 961, also relied upon by the government in said case to sustain the foregoing contention,

merely holds that the claim continues as a claim for taxes, though the court in that case admits the liability of a transferee is not "a tax liability in the ordinary sense." It is going a long way to cite this case as tending to sustain the constitutionality of section 280, in view of the court's conclusion that *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 Fed. (2d) 798, is unanswerable.

It is interesting in relation to the notation that a transferee's liability is a tax liability to note the language of Hon. Wm. R. Green, Chairman of Ways and Means, in the conference report set out in the appendix hereto. It is there said that the purpose was to apply the same procedure against the transferee "as though he were the taxpayer." It may be suggested also that this report indicates that the statute is not intended to apply to "a *bona fide* sale." (See report in appendix hereto.) It is also interesting to note that Mr. Green, when he became a member of the Board of Tax Appeals, was forced to conclude, as is evidenced in his opinion in the *Cappellini* case, 14 B. T. A. 1269, that section 280 was invalid.

In the foregoing case the government also cited and relied upon *Hersee* v. *Porter*, 100 N. Y. 403, 3 N. E. 338; *United States* v. *Baltimore & Ohio R. R.*, 17 Wall. 322; *Dike* v. *Carleton*, 61 N. H. 574; *Fowble* v. *Kemp*, 92 Md. 630, 48 Atl. 379; *Vermont and C. R. Company* v. *Vermont Cent. R. Co.*, 63 Vt. 1, 21 Atl. 262; *Gray* v. *Finn*, 96 Mich. 62, 55 N. W. 615; *Michigan Lake Superior Power Company* v. *Atwood*, 126 Mich. 651, 86 N. W. 139; *Bloxham* v. *Fla. Central R. R. Co.*, 35 Fla. 625, 17 So. 901; *Sears* v. *Cottrell*, 5 Mich.

251; *Morrow* v. *Dows*, 28 N. J. Eq. 459; *McGregon* v. *Montgomery*, 4 Pa. State 237; *Dawson* v. *Dawson*, 106 Ga. 45, 32 S. E. 29; *Blacklock* v. *United States*, 208 U. S. 75; *United States* v. *Snyder*, 149 U. S. 210; *United States* v. *Curry, et al.*, 201 Fed. 371, and *United States* v. *Dillin*, 168 Fed. 813. But we are unable to see wherein said cases, or any of them, have the least tendency to sustain the constitutionality of section 280. If these cases touch the instant case in any way, it is in showing that the issue raised by one who claims that his property is not subject to certain taxes on the theory that the tax was against another, is always one disposed of as a judicial matter. A number of these cases relate merely to the validity of statutes imposing a duty on agents and the like to pay taxes, which, of course, only goes to the mode of collection.

However, these cases do sustain the proposition that when a tax warrant is issued against A., it may be levied against property in possession of B., if the officer thinks the property belongs to A. But the cases show that if B. claims the property the issue is for the courts. Not one of these cases has anything to do with creditors' suits based on taxes, or the right to assess transferees. Suffice it to say that an examination of these several cases will disclose that they are clearly not in point with the case at bar.

In the foregoing case the government also cited and relied upon several cases to show that power to pass on facts and apply law may even be conferred on administrative officers. We have no quarrel with any such cases. The real question is where the line is to be drawn, since the courts

have never surrendered their exclusive constitutional jurisdiction over judicial matters, and the line has been drawn by this Court in *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789. If the matter is one of the kind that may be given to administrative officers without judicial hearing, then hearing may be provided for, but before administrative tribunals or officers, not otherwise.

In the foregoing case the government seemed to rely principally upon the case of *Murray's Lessees, et al.*, v. *Hoboken Land and Improvement Company*, 18 How. 272, which is against it. The case was ejectment by plaintiff, who had purchased the land in question at an execution sale, against defendant, who had purchased it at a sale under an administrative distraint sale against a defaulting officer. The lien under the distraint was prior if the distraint warrant was valid. The Court held it was. *But notice this, for it is the gist of the decision:* the Court reached its conclusion upon the historical ground *that such proceedings against officers had always been administrative.* So the case harmonizes exactly with the *Bakelite* case. And in the opinion the Court said:

> *"To avoid misconstructions upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty;* nor on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

There is no similar historical background for section 280—just the reverse. Again turning to the Green report (see appendix) we read thus: "Prior to the 1926 Act, collection procedure against the transferee (except where a lien had attached before the transfer) was by suit at law or in equity in the federal District Court." Of course, we all know that creditors' suits have always been regarded as involving issues wholly judicial. Section 280 has no supporting history behind it.

Point E.

Criticism of the Case of *Routzahn v. Tyroler.*

The above case and the case at bar are the only cases that we know of which hold that the above referred to section 280 is constitutional, but having read and reread the *Routzahn* case, we confidently believe that the Court will not obtain much satisfaction therefrom. And it is noteworthy that on the same day the Sixth Circuit Court of Appeals handed down its opinion in the *Routzahn* case it handed down an opinion in the case of *Nauts* v. *Clymer*, 36 Fed. (2d) 207, in which it said:

> "We assume, without deciding, that section 280 of the Act of February 26, 1926 (chapter 27, 44 Stat. 9), is valid," etc.

We have heretofore commented upon the *Routzahn* case, but before concluding this brief we desire to advance a few additional thoughts in connection therewith.

We think the most that can be said of the *Routzahn* case is that the decision therein must be limited to the hold-

ing that the following contention of the appellee in that case, to-wit, that section 280 was violative of Amendment 5 to the Constitution for the reason and upon the ground "that an opportunity to be heard ended with Board of Tax Appeals," was untenable, and that such limited holding was predicated upon the erroneous holding of the court that a "transferee has right to have whole matter heard by Circuit Court of Appeals under Revenue Act 1926, section 1001." And that such holding was erroneous, we have heretofore cited cases from seven Circuit Courts of Appeals to the effect that a transferee does not have "right to have the whole matter heard by Circuit Court of Appeals," but that the conclusion of the Board of Tax Appeals upon the facts is conclusive and that the Circuit Court of Appeals is limited to reviewing questions of law.

While in the *Routzahn* case the Court states that for the purpose of its decision it assumes that a transferee's liability "is not one inherently incidental to the taxing power, but is a judicial question beyond the power of Congress to transfer to the administrative category," it is obvious that the court then proceeds to reach its conclusions and decide the case upon the contrary and erroneous assumption that the matter of determining a transferee's liability is an administrative matter. And we have heretofore shown that in no view of the matter can the question as to the liability of a transferee be held to be an administrative matter, but is inherently and essentially a judicial matter, and that consequently it is beyond the power of Congress to transfer the same to "the administrative category."

The vice of the *Routzahn* decision is twofold: *(1)* In erroneously holding that a transferee "has the right to have the whole matter heard by Circuit Court of Appeals in the exercise of its power to review;" and *(2)* in erroneously holding that the determination of the liability of a transferee is an administrative and not a judicial matter.

Of course, if the matter of determining the liability at law or in equity of a transferee is an administrative and not a judicial matter, Congress might confer upon the Commissioner of Internal Revenue the right to make such determination, regardless of any provision for appeal to the Board of Tax Appeals and then to the Circuit Court of Appeals. But, on the other hand, if, as we have argued and shown, such determination is a judicial matter, the division of governmental functions under the Constitution is such that Congress has no power to confer upon the Commissioner of Internal Revenue the right to make such determination, even though an appeal to the Board of Tax Appeals and then to the Circuit Court of Appeals be given the transferee.

In the *Routzahn* case the court criticizes the holding of the Board of Tax Appeals in the *Cappellini* case (14 B. T. A. 1269), to the effect that a transferee by appealing to the Board of Tax Appeals waives the right or is estopped to question the constitutionality of section 280, but it seems from the Supreme Court cases cited by the Board that its conclusion has pretty good support in the authorities. They certainly sustain the doctrine that a party may by his acts or omissions waive the right to raise a constitutional ques-

tion. And when the sole right of a tribunal to hear my complaint depends on a statute which I assert to be invalid, it sounds plausible to say that I waive the right to object to the statute by appealing to the tribunal.

Point F.

Criticism of the Opinion of the Circuit Court of Appeals in the Case at Bar.

The opinion of the Second Circuit Court of Appeals in the case at bar is predicated upon the opinion of the Sixth Circuit Court of Appeals in the case of *Routzahn* v. *Tyroler*, *supra*, and, therefore, our foregoing criticism of the latter case is applicable to the case at bar. More need not be said.

Point G.

The *Old Colony* Case Is Not in Point.

Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716, 73 L. ed. 918, decided June 3, 1929, sustaining the right of the Circuit Court of Appeals to review decisions of the Board of Tax Appeals, has nothing whatsoever to do with the validity of section 280, since the suit did not involve a transferee. What was said in that case was undoubtedly limited to the rights and remedies of taxpayers, and has no application to the rights and remedies of a transferee of the properties of a taxpayer. The decision is of no value in the instant case.

Conclusion.

In view of the foregoing, we respectfully submit that under no view of the matter can section 280 of the Revenue Act of 1926 be held constitutional.

JAMES C. DENTON,
RICHARD H. WILLS,
Counsel for Mid-Continent Petroleum Corporation, a Corporation, as Amici Curiae.

APPENDIX.

The report of the Conference Committee of the House and Senate (Report No. 356, 69th Congress, 1st Session) reporting the last amendment under which section 280 went into the final draft of the Revenue Act of 1926.

Quoting from above report (pages 42-44):

The Senate amendment added a new section, the House bill containing no corresponding provisions. The House recedes with an amendment which is a substitute for the Senate amendment. The substitute modifies the Senate amendment in the matter of interest and the statute of limitations for assessment of transferees. Further it omits certain unnecessary language of the Senate amendment that was merely explanatory and rephrases for purpose of clarification certain other language of the Senate amendment. As thus modified the provisions of the Senate amendment are summarized in the following paragraphs:

"The amendment covers a number of situations in which by reason of the fact that the assets of the taxpayer have been disposed of in whole or in part the government can not successfully distrain or otherwise collect the full amount of the tax originally returned or found due as a deficiency. For example:

"*(1)* Corporation A may distribute its assets to its shareholders and thereupon either dissolve or continue undissolved.

"*(2)* Corporation A may sell its assets to corporation B for a fair consideration either in cash or property or in stock of B. The proceeds are transmitted directly by corporation B to the shareholders of corporation A or indirectly to them through corporation A.

Corporation A thereupon either dissolves or continues undissolved.

"*(3)* Corporation A may reorganize into a partnership.

"*(4)* Corporation A may reorganize into corporation B by a mere change of name or state of incorporation or by an amendment of the financial provisions of its charter."

(Then follow other illustrations not material here.)

By reason of the trust fund doctrine and various state statutory provisions the transferee of assets of an insolvent transferor is ordinarily liable for the accrued and unpaid taxes of the transferor. The amount of such liability is not in excess of the assets received and the transferee has a right to recoupment against other transferees of the assets of the same taxpayer if the transferee is held liable in excess of his pro rata share of the tax liability of the transferor. Regardless of the insolvency the same doctrine applies in case of the transfer of assets of a taxpayer who has died since the transfer or in the case of a corporation that has since the transfer dissolved or otherwise terminated its existence without making adequate provision for tax liabilities. Proceedings against the transferee are ordinarily had in equity, though if the taxpayer is still in existence, an unsatisfied return of execution must be had against him and a creditor's bill brought to satisfy the judgment. *Swan Land & Cattle Co.* v. *Frank,* (148 U. S. 603).

Without in any way changing the extent of such liability of the transferee under existing law, the amendment enforces such liability (whether in respect to the tax as originally returned by the taxpayer or a deficiency therein)

in the same manner as liability for a tax deficiency is enforced; that is, notice by the commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts. Such a proceeding is in lieu of the present equity proceeding and is exclusive, save that, of course, in a proper case, a tax lien upon the assets arising prior to their transfer may be enforced against the transferee by distraint, or in case of real estate by a proceeding in equity. In the case where the taxpayer remains in existence after the transfer, an unsatisfied return of a distraint warrant, issued in pusuance of an assessment lawfully made after a deficiency letter has been mailed to the taxpayer, would suffice in lieu of an unsatisfied execution to establish the liability of the taxpayer.

In view of the above situation it will be seen that the amendment makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes. The amendment thereby substitutes the specialized and more expeditious procedure of the Board for that of the District Courts in equity and will develop through the Board a uniformity of precedents in lieu of the present rather vague principles of law governing the liability of a transferee for unpaid taxes of a transferor.

The pertinent portion of section 280 to which the committee's report above mentioned relates is as follows:

> SEC. 280 *(a)* The amounts of the following liabilities shall * * * be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *.

(1) The liability at law or in equity of a transferee of property of a taxpayer * * *.

Report of the Joint Committee on Internal-Revenue Taxation.

In the Report of the Joint Committee on Internal-Revenue Taxation, which was submitted to Congress by Honorable William R. Green, Chairman of the Ways and Means Committee of the House of Representatives, on November 15, 1927, in connection with the proposed Revenue Act of 1928, then pending before Congress, the following statement appears on pages 15 and 16 of Volume I thereof:

> If a taxpayer transfers his property (other than a *bona fide* sale) and thus is unable to pay a proposed additional tax, it becomes necessary to proceed against the transferee, whose liability for the tax is based ordinarily on the so-called "trust fund" doctrine. Such transfers commonly occur in the everyday dissolution of corporations and distributions of estates, though occasionally property transfers are made for the specific purpose of evading payment of the tax.
>
> Prior to the 1926 Act, collection procedure against the transferee (except where a lien had attached before the transfer) was by a suit at law or in equity in the Federal District Court. Though section 280 does not purport to change the transferee's liability, it does introduce a new method of collection. In effect the transferee is subjected to the same collection procedure as though he were the taxpayer. A deficiency letter is sent to him, he may appeal to the Board of Tax Appeals, collection may be enforced by distraint if he does not appeal, and he is subject to jeopardy assessments.
>
> The constitutionality of the section has been questioned and a District Court in Kentucky has held it un-

constitutional. *(Owensboro Ditcher & Grader Co. v. Lucas,* 18 F. (2d) 796.) The case has been appealed.

Section 280 appears to be the exclusive remedy at the present time; that is, the commissioner no longer may proceed against transferees by suit in the lower Federal courts. The docket of the Board of Tax Appeals is congested. Moreover, in certain kinds of cases it seems desirable to permit the commissioner to bring suit in the Federal courts rather than to proceed under section 280. This is particularly desirable where the transfer was made in good faith and where the liability ought to be apportioned among many transferees. It is recommended that the procedure by suit be resorted to as an alternative method of collection.

SUPREME COURT OF THE UNITED STATES.

No. 455.—October Term, 1930.

Annie G. Phillips et al., Petitioners, vs. Commissioner of Internal Revenue. } On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 25, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

In 1919, the Coombe Garment Company, a Pennsylvania corporation, distributed all of its assets among its stockholders, and then dissolved. Thereafter, the Commissioner of Internal Revenue made deficiency assessments against it for income and profits taxes for the years 1918 and 1919. A small part of these assessments was collected leaving an unpaid balance of $9,306.36. I. L. Phillips of New York City, had owned one-fourth of the company's stock and had received $17,139.61 as his distributive dividend. Pursuant to § 280 (a) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61, the Commissioner sent due notice that he proposed to assess against, and collect from, Phillips the entire remaining amount of the deficiencies. No notice of such deficiencies was sent to any of the other transferees, and no suit or proceedings for collection was instituted against them. Upon petition by Phillips' executors for a redetermination, the Board of Tax Appeals held that the estate was liable for the full amount. 15 B. T. A. 1218. Its order was affirmed by the United States Circuit Court of Appeals for the Second Circuit. 42 F. (2d) 177. Because of conflict in the decisions of the lower courts[1] a writ of certiorari was granted. 282 U. S. 828.

Stockholders who have received the assets of a dissolved corporation may confessedly be compelled, in an appropriate proceeding,

[1]Compare Owensboro Ditcher & Grader Co. v. Lewis, 18 F. (2d) 798; Mid-Continent Petroleum Corporation v. Alexander, 35 F. (2d) 43; Routzahn v. Tyroler, 36 F. (2d) 208. See also Felland v. Wilkinson, 33 F. (2d) 961; Cappellini v. Commissioner, 14 B. T. A. 1269.

to discharge unpaid corporate taxes. Compare *Pierce* v. *United States*, 255 U. S. 398. Before the enactment of § 280 (a) (1), such payment by the stockholders could be enforced only by bill in equity or action at law.[2] Section 280 (a) (1) provides that the liability of the transferee for such taxes may be enforced in the same manner as that of any delinquent taxpayer.[3]

The procedure prescribed for collection of the tax from a stockholder is thus the same as that now followed when payment is sought directly from the corporate taxpayer. This procedure is now generally known, and some parts of it will later be considered

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[2]Such proceedings to obtain payment of corporate income and profits taxes from stockholders or other transferees have been frequently brought. See United States v. McHatton, 266 Fed. 602; Updike v. United States, 8 F. (2d) 913, certiorari denied, 271 U. S. 661; United States v. Capps Mfg. Co., 9 F. (2d) 79, affirmed, 15 F. (2d) 528; United States v. Fairall, 16 F. (2d) 328; United States v. Klausner, 25 F. (2d) 608; United States v. Armstrong, 26 F. (2d) 227; United States v. Garbutt, 27 F. (2d) 1000, modified, 35 F. (2d) 924; United States v. Pann, 23 F. (2d) 714, affirmed, 44 F. (2d) 321. Compare United States v. Boss & Peake Automobile Co., 285 Fed. 410, affirmed, 290 Fed. 167; Dreyfuss Dry Goods Co. v. Lines, 18 F. (2d) 611, reversed, 24 F. (2d) 29; United States v. Snook, 24 F. (2d) 844, reversed, sub. nom. Austin v. United States, 28 F. (2d) 677; United States v. Updike, 25 F. (2d) 746, affirmed, 32 F. (2d) 1, 281 U. S. 489; People's Industrial Life Ins. Co. v. United States, 29 F. (2d) 650.

Where the transferee took property subject to the tax lien of the United States, the lien could be enforced by summary proceeding. Rev. Stat. §§ 3185-3205; Mansfield v. Excelsior Refining Co., 135 U. S. 326, 336; Blacklock v. United States, 208 U. S. 75, 87. Or by an action in equity. Rev. Stat. 3207. Compare 26 U. S. C., §§ 115, 136; Heyward v. United States, 2 F. (2d) 467; In re Glover-McConnell Co., 9 F. (2d) 682, 686. See also United States v. Capital City Dairy Co., 252 Fed. 900, 904; United States v. Haar, 27 F. (2d) 250, 251, certiorari denied, 278 U. S. 634.

[3]"The liability, at law or in equity, of a transferee of property of a taxpayer in respect of the tax . . . imposed . . . any prior income, excess-profits, or war profits tax Act" shall "be assessed, collected, and paid in the same manner . . . as a deficiency in a tax imposed by this title (including the provisions in case of a delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds)." 44 Stat. 61. This remedy is in addition to proceedings to enforce the tax lien or actions at law and in equity. Act of February 26, 1926, c. 27, § 1123 (b), 44 Stat. 9, 121; Act of May 29, 1928, c. 852, § 617 (b), 45 Stat. 791, 877. Compare United States v. Greenfield Tap & Die Corp., 27 F. (2d) 933; United States v. Updike, 25 F. (2d) 746, 747, affirmed, 32 F. (2d) 1, 4, 281 U. S. 489.

in detail. As applied directly to the taxpayer, its constitutionality is not now assailed. Compare *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716. But it is contended that to apply it to stockholder transferees violates several constitutional guarantees; that additional obstacles are encountered if it is applied to transfers made before the enactment of § 280 (a) (1); that the specific liability here sought to be enforced is governed by the law of Pennsylvania and barred by its statute of limitations; and that, in no event, can the stockholder be held liable for more than his pro rata share of the unpaid corporate tax.

First. The contention mainly urged is that the summary procedure permitted by the section violates the Constitution because it does not provide for a judicial determination of the transferee's liability at the outset. The argument is that such liability (except where a lien had attached before the transfer) is dependent upon questions of law and fact which have heretofore been adjudicated by courts; that to confer upon the Commissioner power to determine these questions in the first instance, offends against the principle of the separation of the powers; and that the inherent denial of due process is not saved by the provisions for deferred review in a suit to recover taxes paid, or, in the alternative, for an immediate appeal to the Board of Tax Appeals with the right to review its determination in the courts, because there are limitations and conditions in either method of judicial review.

Section 280 (a) (1) provides the United States with a new remedy for enforcing the existing "liability at law or in equity." The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. The obligation to be enforced is the liability for the tax. *Russell* v. *United States*, 278 U. S. 181, 186; *United States* v. *Updike*, 281 U. S. 489, 493-4. The proceeding is one to collect the revenue. That Congress deemed the section necessary in order to make the tax-collecting system more effective, is established not only by the fact of enactment but also by the reports of the committees.[4]

[4]Conference Report to accompany H. R. 1, H. Rep. No. 356, 69th Cong., 1st Sess., February 22, 1926, p. 44, states that the section "makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes . . . for procedural

The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled.[5] Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. Compare *Cheatham* v. *United States*, 92 U. S. 85, 88-89; *Springer* v. *United States*, 102 U. S. 586, 594; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 708-709. Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by the writ of habeas corpus, *United States* v. *Woo Jan*, 245 U. S. 552; *Ng Fung Ho* v. *White*, 259 U. S. 276, the statutory prohibition of any "suit for the purpose of restraining the assessment or collection of any tax" postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices

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purposes the transferee is treated as a taxpayer would be treated." Compare H. Rep. No. 2, 70th Cong., 1st Sess., December 7, 1927, pp. 31-32: "Section 280 of the 1926 Act has proved a very effective and necessary method of stopping tax evasion through the various favorite methods recognized by everyone prior to the 1926 Act. The enforcement of the liability through court process had been ineffective and the amount of revenue lost through mala fide transfers or through corporate distribution of assets was admittedly large."

[5]Cheatham v. United States, 92 U. S. 85, 89; State Railroad Tax Cases, 92 U. S. 575, 615; Springer v. United States, 102 U. S. 586, 593; Dodge v. Osborn, 240 U. S. 118, 120; Graham v. du Pont, 262 U. S. 234, 255. The earliest federal excise tax acts contained provisions for suit, or levy by distraint and sale. *E. g.*, Act of March 3, 1791, c. 15, § 23, 1 Stat. 199, 204; Act of December 21, 1814, c. 15, § 5, 3 Stat. 152, 154; Act of January 9, 1815, c. 21, § 26, 3 Stat. 164, 173; Act of January 18, 1815, c. 22, § 5, 3 Stat. 180, 182; *id.*, c. 23, § 9, 3 Stat. 186, 188. Similarly, a tax lien on lands and chattels was early introduced. Act of July 22, 1813, c. 16, § 19, 3 Stat. 22, 30; Act of January 9, 1815, c. 21, § 24, 3 Stat. 164, 172. Compare Act of March 3, 1815, c. 100, §§ 12-15, 3 Stat. 239, 241.

For the ancient English practise of summary seizure of the property of a debtor of a Crown debtor, by means of an immediate extent in the second degree, see West, The Law and Practice of Extents, cc. 1-3, 24; Chitty, Laws of the Prerogative of the Crown, pp. 261, 303-07; Price, Laws and Course of the Exchequer, c. XIV; Robertson, Civil Proceedings By and Against the Crown, c. III, pp. 203-04, 206-07. As to the adoption of the writ in this country, see Hackett v. Amsden, 56 Vt. 201, 206-07. Compare McMillen v. Anderson, 95 U. S. 41.

by revenue officers charged with the general authority to assess and collect the revenue.[6] *Snyder* v. *Marks*, 109 U. S. 189; *Dodge* v. *Osborn*, 240 U. S. 118; *Graham* v. *du Pont*, 262 U. S. 234. This prohibition of injunctive relief is applicable in the case of summary proceedings against a transferee. Act of May 29, 1928, c. 852, § 604, 45 Stat. 791, 873. Proceedings more summary in character than that provided in § 280, and involving less directly the obligation of the taxpayer, were sustained in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272. It is urged that the decision in the *Murray* case was based upon the peculiar relationship of a collector of revenue to his government. The underlying principle in that case was not such relation, but the need of the government promptly to secure its revenues.

Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Insurance Co.* v. *Bowland*, 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing. Compare *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306; *Hutchinson* v. *Valdosta*, 227 U. S. 303; *Adams* v. *Milwaukee*, 228 U. S. 572, 584. Because of the public necessity, the property of citizens may be summarily seized in war-time. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *United States* v.

[6] Rev. Stat. § 3224. There is no substantial relaxation of this principle in the provision that while an appeal is pending before the Board of Tax Appeals, no proceeding by distraint may be taken, and, notwithstanding Rev. Stat. § 3224, such proceeding may be enjoined. Act of February 26, 1926, c. 27, § 274 (a), 44 Stat. 9, 55; Act of May 29, 1928, c. 852, § 272 (a), 45 Stat. 791, 852; Peerless Woolen Mills v. Rose, 28 F. (2d) 661. For even in such case, if the Commissioner believes the assessment or collection of the tax will be endangered by delay, he may make an immediate jeopardy assessment and collect by distraint unless the taxpayer files a bond. Act of February 26, 1926, c. 27, § 279, 44 Stat. 9, 59; Act of May 29, 1928, c. 852, § 273, 45 Stat. 791, 854; Salikoff v. McCaughn, 24 F. (2d) 434. Compare Burnet v. Chicago Railway Equipment Co., 282 U. S. 295, 303. The paramount right of the United States to require immediate payment, or surety therefor, is not diminished.

Pfitsch, 256 U. S. 547, 553. Compare *Miller* v. *United States*, 11 Wall. 268, 296; *International Paper Co.* v. *United States*, 283 U. S. —; *Russian Volunteer Fleet Corporation* v. *United States*, 283 U. S. —. And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. Compare *Kohl* v. *United States*, 91 U. S. 367, 375; *United States* v. *Jones*, 109 U. S. 513, 518; *Crozier* v. *Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 306.[1]

The procedure provided in § 280 (a) (1) satisfies the requirements of due process because two alternative methods of eventual judicial review are available to the transferee. He may contest his liability by bringing an action, either against the United States or the collector, to recover the amount paid. This remedy is available where the transferee does not appeal from the determination of the Commissioner, and the latter makes an assessment and enforces payment by distraint; or where the transferee voluntarily pays the tax and is thereafter denied administrative relief. Compare *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 31; *Wickwire* v. *Reinecke*, 275 U. S. 101, 105; *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 560. Or the transferee may avail himself of the provisions for immediate redetermination of the liability by the Board of Tax Appeals since all provisions governing this mode of review are made applicable by § 280. Compare *Routzahn* v. *Tyroler*, 36 F. (2d) 208, 209. Thus within sixty days after the Commissioner determines that the transferee is liable for an unpaid deficiency, and gives due notice thereof, the latter may file a petition with the Board of Tax Appeals. Act of February 26, 1926, c. 27, § 274 (a), 44 Stat. 9, 55; Act of May 29, 1928, c. 852, § 272 (a), 45 Stat. 791, 852. Formal notice of the tax liability is thus given; the Commissioner is required to answer; and there is a complete hearing *de novo* according to the rules of evidence applicable in courts of equity of the District of Columbia. Act of May 29, 1928, c. 852, § 601, 45 Stat. 791, 872. Compare *International Banding Machine Co.* v. *Commissioner*, 37 F. (2d) 660. This remedy may be had before payment, without giving bond (unless

[1]The same rule is applied to eminent domain proceedings by a State. Sweet v. Rechel, 159 U. S. 380; Backus v. Fort Street Union Depot Co., 169 U. S. 557; Williams v. Parker, 188 U. S. 491; Bragg v. Weaver, 251 U. S. 57, 62; Hays v. Port of Seattle, 251 U. S. 233, 238; Joslin Manufacturing Co. v. Providence, 262 U. S. 668, 677.

the Commissioner in his discretion deems a jeopardy assessment necessary). The transferee has the right to a preliminary examination of books, papers, and other evidence of the taxpayer; and the burden of proof is on the Commission to show that the appellant is liable as a transferee of property, though not to show that the taxpayer was liable for the tax. Act of May 29, 1928, c. 852, § 602, 45 Stat. 791, 873.[8] A review by the Circuit Court of Appeals of an adverse determination may be had; and assessment and collection meanwhile may be stayed by giving a bond to secure payment. Act of February 26, 1926, c. 27, § 1001, 44 Stat 9, 109; Act of May 29, 1928, c. 852, § 603, 45 Stat. 791, 873. There may be a further review by this Court on certiorari. These provisions amply protect the transferee against improper administrative action. Compare *Hurwitz* v. *North*, 271 U. S. 40.

It is argued that such review by the Board of Tax Appeals and Circuit Court of Appeals is constitutionally inadequate because of the conditions and limitations imposed. Specific objection is made to the provision that collection will not be stayed while the case is pending before the Circuit Court of Appeals, unless a bond is filed; and also to the rule under which the Board's findings of fact are treated by that court as final if there is any evidence to support them.[9] As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount. The privilege of delaying payment pending immediate judicial review, by filing a bond, was granted

[8]It is asserted that these latter provisions, added by the Revenue Act of 1928, could not render valid an assessment void under § 280 of the 1926 Act. But as the objection relates only to the remedy and the hearing before the Board was not held until November, 1928, that is, after the 1928 Act was in effect, any alleged defect was cured.

[9]Avery v. Commissioner, 22 F. (2d) 6, 7; Geo. Feick & Sons Co. v. Blair, 26 F. (2d) 540, 542; Bishoff v. Commissioner, 27 F. (2d) 91, 92; Conklin-Zoone-Loomis Co. v. Commissioner, 29 F. (2d) 698, 700; E. G. Robichaux Co. v. Commissioner, 32 F. (2d) 780, 781; Meinrath Brokerage Co. v. Commissioner, 35 F. (2d) 614, 616. The further objection that this mode of review may deprive the taxpayer of a jury trial contrary to the Seventh Amendment, is unfounded. Even in the alternative action to recover taxes alleged to have been illegally collected, the right "to a jury . . . is not to be found in the Seventh Amendment . . . but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law." Wickwire v. Reinecke, 275 U. S. 101, 105.

by the sovereign as a matter of grace solely for the convenience of the taxpayer.[10] Nor is the second objection of weight. It has long been settled that determinations of fact for ordinary administrative purposes are not subject to review. *Johnson* v. *Drew*, 171 U. S. 93, 99; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380, 394; *Mutual Film Co.* v. *Industrial Commission*, 236 U. S. 230, 246. Compare *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 560. Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings. *Reetz* v. *Michigan*, 188 U. S. 505, 507; *Lieberman* v. *Van De Carr*, 199 U. S. 552, 562; *Douglas* v. *Noble*, 261 U. S. 165, 167; *Tagg Bros. & Morehead* v. *United States*, 280 U. S. 420, 443.[11] The adequacy of the scope of review offered by the Revenue Act of 1926 in the case of a deficiency determined directly against the taxpayer was assumed in *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; and this procedure is now thoroughly established.[12] Questions of fact involved in proceedings against transferees are no different or more complex than those often encountered in determining the direct liability of a taxpayer.[13] The alternative judicial review provided is adequate in both cases.

Second. It is urged by *amici curiae* that the method of assessment and collection permitted by § 280 (a) (1) cannot be applied

[10]See Williamsport Wire Rope Co. v. United States, 277 U. S. 551, 562, Note 7; Russell v. United States, 278 U. S. 181, 186-87; Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 721.

[11]Compare Davis v. Massachusetts, 167 U. S. 43, 48; Gundling v. Chicago, 177 U. S. 183, 187; Fischer v. St. Louis, 194 U. S. 361, 371.

[12]By November 1, 1930, 644 petitions for review under the Revenue Act of 1926 had been decided by the various circuit courts of appeals, and 671 petitions were pending. See statement of the Chairman of the Board of Tax Appeals in Hearing Before the Subcommittee of House Committee on Appropriations, 71st Cong., 3d Sess., January 7, 1931, pp. 19, 26.

[13]Compare Lonsdale v. Commissioner, 32 F. (2d) 537; Hoosier Casualty Co. v. Commissioner, 32 F. (2d) 940; Jacobs v. Commissioner, 34 F. (2d) 333; O'Meara v. Commissioner, 34 F. (2d) 390; Insurance & Title Guarantee Co. v. Commissioner, 36 F. (2d) 842; Penney & Long, Inc. v. Commissioner, 39 F. (2d) 849; Barde Steel Products Corporation v. Commissioner, 40 F. (2d) 412.

where, as in the case at bar, the transfer of assets, upon which the transferee's liability is based, occurred prior to the enactment of the Revenue Act of 1926; and, moreover, that if applied retroactively to such transfer, the section would be unconstitutional. The power of Congress to provide an additional remedy for the enforcement of existing liabilities is clear. Compare *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 427. It is clear also that Congress intended that the section should be available for enforcing the liability of a transferee in respect to taxes "imposed . . . by any prior income, excess-profits, or war-profits tax Act," irrespective of the time at which the transfer was made. The need for a more effective and expedient remedy was not limited to liabilities of transferees thereafter arising. To have so limited the operation of the section would, at least as to earlier Acts, have seriously impaired the value of the new remedy.[14]

Third. It is contended that § 280 (a) (1) is invalid because the liability at law or in equity of a transferee is dependent upon the law of the State of incorporation, and that thus the section improperly delegates the federal taxing power to the State legislatures; and, further, that the tax liability of the transferee, as thus assessed and collected, violates the constitutional requirement of uniformity because differences in State laws may affect such liability. The extent and incidence of federal taxes not infrequently are affected by differences in State laws; but such variations do not ~~invalidate~~ impinge the

[14] There is no suggestion in the Committee Reports on the 1926 Act that § 280 was to be so limited. A contrary intention is perhaps indicated by subdivision (b) (2) which provided that where "the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period", the Commissioner should have six years in which to make an assessment against the transferee, provided he could do so within one year after the enactment of the 1926 Act. Moreover, in all cases, an additional period of one year after the expiration of the period for assessing the taxpayer, was given. Compare H. R. Rep. No. 356, 69th Cong., 1st Sess., February 22, 1926, p. 44. Subdivision (c) provides that in the case of corporations which had been dissolved, the period for assessment of the transferee was to be the same as if such "termination of existence had not occurred." These provisions clearly contemplated a dissolution and transfer of assets prior to the passage of the Act. Compare United States v. Updike, 281 U. S. 489, 494. In the case at bar, two assessments against the corporate taxpayer had been made prior to 1926.

constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Florida* v. *Mellon*, 273 U. S. 12, 17; *Crooks* v. *Harrelson*, 282 U. S. 55; *Poe* v. *Seaborn*, 282 U. S. 101, 117. Compare *Head Money Cases*, 112 U. S. 580, 594; *Clark Distilling Co.* v. *Western Maryland Railway Co.* 242 U. S. 311, 327. We have, therefore, no occasion to decide whether the right of the United States to follow transferred assets is limited by any State laws.

Fourth. It is contended that summary proceeding by the United States to enforce the liability for the tax is barred by the six months statute of limitations on suits against stockholders provided by the Pennsylvania statute. Laws 1874, c. 32, § 15; Penn. Stat. (1920) § 5728. The United States is not bound by State statutes of limitation unless Congress provides that it shall be. *United States* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120; *Chesapeake & Delaware Canal Co.*, 250 U. S. 123, 125; *E. I. du Pont De Nemours & Co.* v. *Davis*, 264 U. S. 456, 462. The detailed limitation periods specified in § 280 evidence the intention that they alone shall be applicable to the proceedings therein authorized.

Fifth. It is contended that even if petitioners are liable, the amount determined is excessive; and that, the findings of the Board of Tax Appeals in the present case are insufficient to support an assessment of the entire balance of the deficiencies. It is first urged that the estate of Phillips can be assessed only for its pro rata share of the deficiency, according to the ratio which the stock held by him bore to the total outstanding stock of the corporate taxpayer at the time of dissolution. The argument is that the federal Equity Rules require that all stockholders be brought in as necessary parties and be proportionately subjected to liability. While it is permissible for a respondent to bring in other stockholders or transferees by a cross-bill,[15] this procedure is founded upon the desire not to burden the courts with a multiplicity of suits. Compare *Hatch* v. *Dana*, 101 U. S. 205, 211. Such rule of convenience is not applicable in summary administrative proceedings like that provided by § 280 (a) (1). One who receives corporate assets upon dissolution is severally liable, to the extent of assets

[15] Compare Equity Rules 25, 39, 42; Watson v. National Life & Trust Co., 162 Fed. 7.

received, for the payment of taxes of the corporation; and other stockholders or transferees need not be joined.[16] Non-joinder cannot affect or diminish the several liability of the stockholder or transferee sued. Compare *Benton* v. *American National Bank*, 276 Fed. 368.[17] The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' rights to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshall the assets of a dissolved corporation so as to adjust the rights of the various stockholders. There is nothing in § 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided.

Petitioners assert also that the finding of the Board that the total assets of the corporation, amounting to $68,588.35, were paid "to its stockholders between July 25, 1919 and September 27, 1919," is insufficient to support the assessment against the estate of the entire remaining deficiency of $9,306.36. The argument is that there may have been several distributions within this period; that since there was no finding as to the existence of other cerditors, it must be assumed that until the assets had been depleted below the amount due for taxes, the corporation was solvent; and that thus the stockholder-transferees did not become liable until the final $9,306.36 of assets was distributed. Hence it is claimed that Phillips' liability for the tax is limited to a pro rata share of the assets finally distributed, that is, to one quarter of the unpaid deficiency. But the plain import of the findings is that there was a

[16]Benton v. American National Bank, 276 Fed. 368; McWilliams v. Excelsior Coal Co., 298 Fed. 884. Compare United States v. Boss & Peake Automobile Co., 285 Fed. 410, affirmed 290 Fed. 167; Capps Manufacturing Co. v. United States, 15 F. (2d) 528; Pann v. United States, 44 F. (2d) 321. See also Adams v. Perryman & Co., 202 Ala. 469; Singer v. Hutchinson, 183 Ill. 606, 620; Kimbrough v. Davies, 104 Miss. 722; Bartlett v. Drew, 57 N. Y. 587.

[17]It was conceded below that if the other stockholders are insolvent, or absent from the jurisdiction, or cannot be ascertained, they need not be joined. Compare Kennedy v. Gibson, 8 Wall. 498, 506; Second National Bank of Erie v. Georger, 246 Fed. 517, 520; United States v. Armstrong, 26 F. (2d) 227, 233.

single distribution which took several months to complete; and there is no question that the entire assets were thereby distributed. Moreover, such argument, urged for the first time here, comes too late. For while the burden was on the Commissioner to prove before the Board that Phillips was liable as a transferee, the facts in the case at bar were stipulated; and it was agreed that the date of complete liquidation was September 27, 1919, by which time petitioners' decedent had received his full share of the distributed assets. Since it was stipulated that the final transfers of assets were without consideration; that they completely exhausted the corporate assets; that the balance of the deficiencies, assessed against the corporation, remains unpaid; and that the distributive dividend received by Phillips was in excess of the remaining tax liability, the burden resting upon the Commissioner was sustained.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.